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No. 800

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IN THE

Supreme Court of the United States

October Term, 1962

WILLIAM J. ADAMS, d/b/a BEACON HILL COMPANY, CORAL, INC. and LOUIS RAIT, INC.,

Petitioners,

—against—

MYRTLE G. HIRSCH, LENORA BENEDEK, JANET BENEDEK, GLADYS COHEN and HOWARD HIRSCH, d/b/a BELAND REALTY COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	3
Constitutional and Statutory Provisions Involved	4
Statement of the Case	7
Reason for Granting the Writ—	
The Queens County Supreme Court, in refusing to give full force and effect to Chief Judge Bruchhausen's order substituting the respondents for the never-existent Beland Realty Corporation, which has the strong support of the United States Court of Appeals for the Second Circuit, decided a federal question of substance not theretofore determined by this Court	15
A. The courts below, in failing to apply the principle of judicial finality as expressed in the doctrines of comity and the law of the case, violated the principles which govern the relations between state and federal courts of the same state	15
B. Comity requires that Chief Judge Bruchhausen's order substituting the respondents for the never-existent Beland Realty Corporation, which has the strong support of the United States Court of Appeals for the Second Circuit, be given full force and effect in the instant proceedings	16

PAGE

C. The law of the case also requires that Chief Judge Bruchhausen's order substituting the respondents for the never-existent Beland Realty Corporation, with the support of the Court of Appeals for the Second Circuit, be given full force and effect 20

D. Moreover, the disingenuous conduct of the defendants should estop them from challenging Chief Judge Bruchhausen's order substituting the respondents for the never-existent Beland Realty Corporation 22

Conclusion 24

Appendix I—Opinion of Rabin, J. 25

Appendix II—Decision of Bruchhausen, J., Dated September 22, 1960 35

Appendix III—Opinion of United States Court of Appeals (284 F. 2d 783) 41

Appendix IV—Order of Affirmance of Appellate Division 53

Appendix V—Denial of United States Supreme Court for Stay 55

PAGE

CITATIONS

Cases

Adams v. Beland Realty Corp., 187 F. Supp. 680 (D.E.D. N.Y. 1960) 2, 3
Adams v. Hirsch, 29 M. 2d 641, 214 N. Y. S. 2d 796 ..... 2, 3, 12, 14
Adams v. Hirsch, N. Y. Law Jour., Jan. 3, 1963, p. 12, col. 2 3
Allegheny County v. Mashuda Co., 360 U. S. 185 (1959) 20
Anderson v. N.V. Transandine Handelmattschapij, 289 N. Y. 9 (1942) 19
Ball v. Canadian Pacific Steamships, 276 N. Y. 650 (1938) 3
Bean, In re, 207 App. Div. 276, 201 N. Y. S. 827 (4th Dept. 1923), aff'd 238 N. Y. 618, 144 N. E. 916
Berner v. Board of Education, 286 N. Y. 174 (1941) 21
Brown v. Du Frey, 1 N. Y. 2d 190 (1956) 21
Bucken v. Long Island R.R. Co., 286 N. Y. 146 (1941) 21
Commercial Nat. Bank, In re, 45 F. Supp. 482 (D.E.D. Pa. 1942), affirmed sub nom In re Reed, 134 F. 2d 172 (3d Cir. 1943) 17
Farmer v. Nat. Life Assn., 138 N. Y. 265 (1893) ... 23
Foley v. Equitable Life Assur. Soc., 263 App. Div. 605, 33 N. Y. S. 2d 917 (2d Dept. 1942) 21
General Motors Corp. v. Bendix Aviation Corp., 123 F. Supp. 506 (D.N.D. Ind. 1954) 17
(1924) 18
Haag v. Barnes, 11 A. D. 2d 430, 207 N. Y. S. 2d 624 (1st Dept. 1960) 18
Halladay v. Worthington, 99 Misc. 141, 163 N. Y. Supp. 362 (1916) 18
Hirsch v. Bruchhausen, 284 F. 2d 783 (2d Cir. 1960) 2, 12

PAGE

Hirsch v. United States Court of Appeals for the Second Circuit 13
Horn v. Vassen, 263 App. Div. 669, 34 N. Y. S. 2d 265 (1st Dept. 1942) 19
H. P. Drewry v. Onassis, 291 N. Y. 779 (1944) 3

Kennedy v. Falk, 230 F. 2d 362 (7th Cir. 1956) 19
Kenny Loan Finance Co. v. Summers, 159 Neb. 57, 65 N. W. 2d 240 18

Leszynski v. Russ, 192 F. Supp. 422 (D.Md. 1961) 17

Martens v. Martens, 284 N. Y. 363 (1940) 18

Paramount Pictures v. Blumenthal, 256 App. Div. 756, 11 N. Y. S. 2d 768 (1st Dept. 1939), appeal dismissed and certified question not answered, 281 N. Y. 682, 23 N. E. 2d 15 (1939) 16
People ex rel. American Surety Co. v. Benham, 71 Misc. 345, 128 N. Y. Supp. 610 (1911) 16

Sayles v. Northwestern Ins. Co., 21 Fed. Cas. No. 12,421 (C.C.R.I. 1856) 23
Schumann v. Loew's Incorporated, 144 N. Y. S. 2d 27 (1955) 22

Universal C.I.T. Credit Corp. v. Vogt, 165 Neb. 611, 86 N. W. 2d 711 (1957) 18

Wasserman, Application of, 240 F. 2d 213 (9th Cir. 1956) 20
West Virginia Motor Truck Ass'n v. Public Service Commission, 123 F. Supp. 206 (D.S.D.W.Va. 1954), affirmed 348 U. S. 881 (1954) 17

Statutes

28 U.S.C. §1257(3) 3

PAGE

Federal Rules of Civil Procedure

Rule 4(h) 4
Rule 15(a) and (c) 4
Rule 21 5
Rule 25(c) 5
Rule 81(c) 5

New York Civil Practice Act

§222-a 6
§237-a, 1, 2 and 4 ..... 6, 14
§589(3)(b) 2

United States Constitution

Art. VI, par. 2 4

Other Authorities

Cohen and Karger, Powers of the New York Court of Appeals, §41, at p. 163 and n. 26 3

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No. .....

WILLIAM J. ADAMS, d/b/a BEACON HILL COMPANY, CORAL, INC. and LOUIS RAIT, INC.,

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MYRTLE G. HIRSCH, LENORA BENEDEK, JANET BENEDEK, GLADYS COHEN and HOWARD HIRSCH, d/b/a BELAND REALTY COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

The petitioners, William J. Adams, d/b/a Beacon Hill Company, Coral, Inc. and Louis Rait, Inc., pray that a writ of certiorari be issued to review the final order of the New York Supreme Court, Appellate Division, Second Judicial Department, entered in the office of the Clerk of the Appellate Division on November 13, 1962, unanimously affirming, without opinion, an order of the Supreme Court, Queens County, entered in the office of the Clerk of Queens County on May 15, 1961.

Opinions Below

The New York Appellate Division, Second Department, rendered no opinion. The Supreme Court, Queens County, rendered an opinion on April 17, 1961, reproduced as Appendix I, *infra* pp. 25-34. This opinion is reported. *Adams v. Hirsch*, 29 M. 2d 641, 214 N. Y. S. 2d 796.

The Supreme Court, Queens County, in effect reversed an order of Chief Judge Walter Bruchhausen of the federal District Court for the Eastern District of New York in *Adams v. Beland Realty Corp.*, 187 F. Supp. 680 (D.E.D. N.Y. 1960). Judge Bruchhausen rendered an opinion, reproduced at Appendix II, *infra* pp. 35-40.

Judge Bruchhausen's order also had the strong support of a two to one decision of the Court of Appeals for the Second Circuit in *Hirsch v. Bruchhausen*, 284 F. 2d 783 (2d Cir. 1960), with Circuit Judge Charles E. Clark writing the majority opinion in which Circuit Judge Calvert Magruder concurred, and Circuit Judge Henry J. Friendly writing a dissenting opinion. These opinions are reproduced in App. III, *infra* pp. 41-52.

Jurisdiction

The final order of the New York Appellate Division, Second Department, was entered on November 13, 1962, reproduced as Appendix IV, *infra* pp. 53-54. Thereafter the petitioners moved in the New York Court of Appeals for leave to appeal pursuant to §589(3)(b) of the New York Civil Practice Act. One of the grounds was the failure of the Supreme Court, Queens County, to give full effect to Judge Bruchhausen's order substituting the respondents

for the never-existent Beland Realty Corporation. Respondents filed an affidavit in opposition in which they asserted that the order and judgment of the Supreme Court, Queens County, did "not finally determine the controversy within the meaning of the New York State Constitution", citing Cohen and Karger, *Powers of the New York Court of Appeals*, §41, at p. 163 and p. 26. The petitioners filed a reply affidavit in which they pointed out that the order appealed from ordered "the action herein dismissed against each and all of the defendants", and that this occurred after the statute of limitations had run on the petitioners' claims, citing *H. P. Drewry* v. *Onassis*, 291 N. Y. 779 (1944); *Ball* v. *Canadian Pacific Steamships*, 276 N. Y. 650 (1938). It is difficult to see how any order, or any judgment for that matter, could have any greater finality than the order in question, or could have more finally determined a controversy.

Nevertheless, on December 31, 1962 the New York Court of Appeals dismissed the petitioners' motion for leave to appeal to that court "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the constitution." *Adams* v. *Hirsch*, N. Y. Law Jour., Jan. 3, 1963, p. 12, col. 2. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Question Presented

Was the order of the federal District Court for the Eastern District of New York in *Adams* v. *Beland Realty Corp.*, 187 F. Supp. 680 (D.E.D.N.Y. 1960), substituting the respondents for the never-existent Beland Realty Corporation, binding on the Supreme Court, Queens County, in *Adams* v. *Hirsch*, 29 M. 2d 641, 214 N. Y. S. 2d 796 (1961)?

Constitutional and Statutory Provisions Involved

1. United States Constitution, Art. VI, par. 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. Rule 4(h) of the Federal Rules of Civil Procedure:

"**Rule 4. Process**

* * * * *

"**(h). Amendment.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued."

3. Rule 15(a) and (c) of the Federal Rules of Civil Procedure:

"**Rule 15. Amended and Supplemental Pleadings**

"**(a) Amendments.** A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or

within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

* * * * *

"**(c) Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

4. Rule 21 of the Federal Rules of Civil Procedure:

"**Rule 21. Misjoinder and Non-Joinder of Parties.**

"Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

5. Rule 25(c) of the Federal Rules of Civil Procedure:

"**Rule 25. Substitution of Parties.**

* * * * *

"**(c) Transfer of Interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule."

6. Rule 81(c) of the Federal Rules of Civil Procedure:

"**Rule 81. Applicability in General**

* * * * * *

"**(c) Removed Actions.** These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. * * * "

7. New York Civil Practice Act, §222-a:

"**Action or proceeding in partnership name.**

"Two or more persons carrying on business as partners may sue or be sued in their partnership name whether or not such name comprises the names of the persons. If the persons be defendants in an action or proceeding, the summons or other process may be served upon any one or more of them with like effect as though all of the persons had been named as defendants by their own respective names. Where a judgment is taken against the defendants, the clerk with whom the judgment-roll is filed, must write upon the docket opposite the name of each defendant upon whom the summons was served, the word "summoned"; and a like entry must be made by each county clerk with whom the judgment is afterwards docketed. An execution upon such judgment may be collected out of the real and personal property of the partnership, and out of the real and personal property of the persons summoned, whose names shall be indorsed on the execution."

8. New York Civil Practice Act, §237-a, 1, 2 and 4:

"**Defendant's special appearance.** 1. Except as otherwise provided in subdivision two, a defendant may make a special appearance solely to object to the court's jurisdiction over his person. Such objection, whether based on the ground that process or its service is insufficient or that the defendant is a person

not subject to the jurisdiction of the court, must be raised by a motion to set aside the service of process or to strike out part of the complaint, as may be appropriate. The objection, if raised in a manner other than that provided in this section or if combined with an objection to the merits, except as otherwise provided in subdivision four, shall be deemed waived.

"2. An objection to the court's jurisdiction over the person of the defendant shall not be waived by joining therewith a motion objecting to the court's jurisdiction over the subject matter.

"4. After a motion made pursuant to this section has been denied, the defendant may litigate the action on the merits without being deemed to have waived his objection to the court's jurisdiction over his person."

Statement of the Case

The petitioners brought their action in Queens County Supreme Court against the Beland Realty Corporation, alleging it to be a New Jersey corporation. There was no such precise entity, and never had been. There had been a Beland Realty Corporation of New Jersey, a New Jersey corporation; and there had been a Beland Realty Corporation, a New York Corporation. The New York corporation owned all of the stock of the New Jersey corporation, as well as the premises involved in the instant action. Both corporations were dissolved on May 1, 1952, more than two years before the institution of this suit. The assets of these corporation were transferred to the respondents, d/b/a Beland Realty Company, a partnership.

The petitioners sought to recover damages resulting from the flow of water into their premises 32-02 Queens Boulevard, Long Island City, New York, through the negligence of the owner of the building. The owner, we now know, was the respondent partnership. But the petitioners were not aware of this when they brought their action, nor for some time thereafter.

The summons and complaint were served in October 1954 on Ernest Boehm, the superintendent or managing agent of the premises. He turned them over to the respondents, and they then engaged upon the disingenuous course of conduct about to be related.

The respondents sent the summons and complaint to Rosenthal & Klein, their insurance brokers. Rosenthal & Klein, in a letter of November 2, 1954, acknowledged receipt of the summons and complaint and advised that they were that "date forwarding same to our insurance company". They also suggested that the respondents have their attorneys contact Mr. Martin Rosen, the attorney for the petitioners, for an extension of time within which to plead. The insurance company to whom Rosenthal & Klein sent the summons and complaint was the Berkshire Mutual Fire Insurance Company, which had issued a policy on the premises in question to the respondent partnership.

Thereafter the law firm of Goldstein, Golenbock & Barell (subsequently Golenbock and Barell), representing the respondents, as well as the law office of Max J. Gwertzman, representing the Berkshire Mutual Fire Insurance Company as well as the respondents, requested of Mr. Rosen, and obtained, repeated extensions of time on behalf of the respondents to answer the complaint.

Finally on January 3, 1955 Mr. Gwertzman, acting both for the insurance company and the respondents, sought removal of the action to the federal District Court for the Eastern District of New York because of diversity of citizenship. He did this in the name of the never-existent Beland Realty Corporation. For this purpose the respondents, without disclosing that there was no New Jersey corporation with the name simply of Beland Realty Corporation, and without disclosing further that the Beland Realty Corporation of New Jersey had been dissolved on May 1, 1952, caused Joseph W. Levin as "the assistant secretary of the Beland Realty Corporation" to sign a removal petition which fallaciously stated:

> "That the said defendant, Beland Realty Corporation, now is and was for a long time prior thereto, still is and was at the commencement of this action, a foreign corporation, duly organized and existing under and by virtue of the Laws of the State of New Jersey".

This removal petition also denied that the "Beland Realty Corporation" had been guilty of negligence:

> "That the defendant, Beland Realty Corporation, has refused to pay the said losses on the ground that it claims the damage which may have been sustained was in no way caused by any negligence or fault on its part".

In the verification to the petition Mr. Levin fallaciously swore:

> "that he is the Assistant Secretary of Beland Realty Corporation, a corporation duly organized and existing under and by virtue of the Laws of the State of New Jersey, the defendant in this action."

On January 6, 1955 Mr. Gwertzman, on behalf of the respondents, filed an answer in the federal District Court in the name of the fictional Beland Realty Corporation. This answer was a general denial.

In the federal court, in the words of Judge Bruchhausen: "all preliminary examinations were thoroughly conducted by both sides". Mr. Rosen, for the petitioners, served notice to take the deposition of the defendant Beland Realty Corporation, by Mr. Ernest Boehm, superintendent of defendant's premises at 32-02 Queens Boulevard, Long Island City, New York". Mr. Gwertzman, on behalf of the respondents, served notice to take the depositions of the petitioners, William J. Adams, d/b/a Beacon Hill Company, Coral, Inc. and Louis Rait, Inc. as well as the Home Insurance Company.

Pursuant to the notice of petitioners, Mr. Gwertzman on behalf of the respondents produced Ernest Boehm for examination by Mr. Rosen. Mr. Rosen's second and third questions and Mr. Boehm's answers were as follows:

> "2. Q. Are you an employee of the Beland Realty Corp., and were you so employed on or about Jan. 18th, 1954? A. Yes.
>
> "3. Q. How long had you been employed by that Corporation and in what capacity? A. For four years as Superintendent of the building".

In addition to the examinations before trial, Mr. Gwertzman, on behalf of the respondents, also served notice of demand on the petitioners for answers to interrogatories under oath pursuant to Rule 33 of the Federal Rules of Civil Procedure; and thereafter entered into a stipulation with reference to those interrogatories with Mr. Rosen.

After the examinations before trial, the case was placed on the trial calendar. At the pre-trial call before Judge Royce H. Savage, the respondents in the name of the fictional corporate entity, moved for the dismissal of the complaint on the ground of nonownership, management or control. At that pre-trial, counsel for the respondents exhibited a deed from the New York corporation to the respondent partnership transferring the premises in question to the respondents. Until that time the respondents had concealed this fact. All notices of claims and pleadings were turned over to the attorneys for the partnership, who in turn forwarded them to the attorneys for the insurance company.

With reference to the full participation by the respondents in the instant litigation until after the statute of limitations had run, Chief Judge Bruchhausen correctly observed:

> "In the case at bar the parties involved knew from the beginning of the alleged claim, the defendant was given additional time to answer, all preliminary examinations were conducted by both sides. Truly, the parties were before the court. . . ."
>
> . . . . . .
>
> "Mr. Boehm who was served cannot be classified as a mere janitor. His examination before trial clearly indicates that Mr. Boehm as superintendent was in charge of the premises and of men working under his direction. He was served by the plaintiff and gave the papers to the partners who acted upon them. The partnership continuously participated in the proceedings. The corporation never moved for a dismissal as being the wrong party, but in reality conducted the entire defense until it made its motion to

> dismiss before Judge Savage, after the statute of limitations had expired." *Adams* v. *Beland Realty Corp.*, 187 F. Supp. 680, 681, 682 (D.E.D.N.Y. 1960).

The petitioners then moved, pursuant to Rules 15 and 4(h) of the Federal Rules of Civil Procedure, to amend the title of the instant action by substituting Myrtle G. Hirsch, Lenora Benedek, Janet Benedek, Gladys Cohen and Howard Hirsch, d/b/a Beland Realty Company, as parties defendants in place of Beland Realty Corporation. Judge Bruchhausen granted their motion. However, on this state of the record there being no diversity, he also remanded the case to the Queens County Supreme Court., *Adams* v. *Beland Realty Corp.*, 187 F. Supp. 680 (D.E.D.N.Y. 1960).

The respondents appealed to the United States Court of Appeals for the Second Circuit. On October 19, 1960 the federal Court of Appeals dismissed the appeal for lack of an appealable order. Then the respondents petitioned the Court of Appeals for the Second Circuit for a writ of mandamus to compel Chief Judge Bruchhausen to vacate his order. This petition was denied by a two to one decision, *Hirsch* v. *Bruchhausen*, 284 F. 2d 783 (2d Cir. 1960), with Circuit Judge Clark writing the majority opinion in which Judge Calvert Magruder concurred, and Circuit Judge Henry J. Friendly writing a dissenting opinion. The Second Circuit felt not only that Judge Bruchhausen had "clear authority" but also that it was his "manifest duty" to order the amendment substituting the defendants for the never-existent corporation:

> "F.R. 81(c) provides as to 'Removed Actions': 'These rules apply to civil actions removed to the United States district courts from the state courts

> and govern procedure after removal. Repleading is not necessary unless the court so orders.' See Freeman v. Bee Machine Co., 319 U. S. 448, 63 S. Ct. 1146, upholding amendment to state a new claim after removal. Thus Judge Bruchhausen had clear authority to order the amendment substituting parties, see F.R. 24, 25 (a)(c); and it was his manifest duty to do so and to make sure that the real issue was litigated between the parties actually involved". 284 F. 2d at 786.

With reference to the guileful conduct of the respondents the Court of Appeals commented:

> "... There is no permanent prejudice to them to find themselves just where they should have been had they been more frank earlier as to the ownership of the realty. Nor do we see how their charge of negligent and careless prosecution of the case by their opponents gets them far, for, whatever its past vicissitudes, the case remained pending and obviously must now be heard in the proper tribunal therefor." 284 F. 2d at 786.

The respondents then applied to Mr. Justice John M. Harlan for a stay pending a writ of certiorari to this Court. *Hirsch* v. *United States Court of Appeals for the Second Circuit*. On December 12, 1960 Mr. Justice Harlan denied this application with the endorsement: "I can find no equity in this application or any other reason for granting the stay which the Court of Appeals has denied. Application denied." The report of Mr. Justice Harlan's ruling is reproduced in Appendix V, *infra*, pp. 55-56.

Nevertheless, when the case returned to the Queens County Supreme Court, Mr. Justice Samuel Rabin granted the

respondents' motion, made pursuant to §237-a of the Civil Practice Act to dismiss the proceedings on the ground that service of process was not made in the manner provided by §222-a of the Civil Practice Act. *Adams* v. *Hirsch*, 29 M. 2d 641, 214 N. Y. Supp. 2d 796 (1961). The Appellate Division, Second Department affirmed, without opinion, Mr. Justice Rabin's order.

It is submitted that the principle of judicial finality, as expressed in the doctrines of comity and the law of the case, requires that Chief Judge Bruchhausen's order substituting the respondents for the never-existent Beland Realty Corporation, which has the strong support of the United States Court of Appeals for the Second Circuit, should have been given full effect by the Queens County Supreme Court. The petitioners argued before the Queens County Supreme Court that Judge Bruchhausen's order was binding upon it. The Queens County Supreme Court expressly ruled to the contrary. (App. 1, pp. 25-34.)

REASON FOR GRANTING THE WRIT

The Queens County Supreme Court, in refusing to give full force and effect to Chief Judge Bruchhausen's order substituting the respondents for the never-existent Beland Realty Corporation, which has the strong support of the United States Court of Appeals for the Second Circuit, decided a federal question of substance not theretofore determined by this Court.

A.

The courts below, in failing to apply the principle of judicial finality as expressed in the doctrines of comity and the law of the case, violated the principles which govern the relations between state and federal courts of the same state.

The Anglo-American legal system developed a principle of judicial finality. If an individual had once been required to litigate a disputed point, that was usually an end of the matter. It might be either in a criminal or a civil proceeding. It might be either with the state or another individual.

This principle was for the benefit not only of the individual, but also of the courts. It saved the time of the courts and made for the more expeditious and efficient disposition of judicial proceedings. Moreover, and certainly not least, the principle of judicial finality made for greater certainty in the law and fostered the growth of the rule of law.

The principle of judicial finality has expressed itself in various forms: double jeopardy; *res judicata*; collateral estoppel; full faith and credit; comity; law of the case; and stare decisis or the doctrine of precedents. The two forms of judicial finality which are dispositive of this case are comity and the law of the case.

B.

Comity requires that Chief Judge Bruchhausen's order substituting the respondents for the never-existent Beland Realty Corporation, which has the strong support of the United States Court of Appeals for the Second Circuit, be given full force and effect in the instant proceedings.

The parts of the principle of judicial finality which are particularly applicable to this case are comity, and the law of the case. Comity requires that Chief Judge Bruchhausen's order substituting the defendants for the never-existent Beland Realty Corporation, which has the strong support of the United States Court of Appeals for the Second Circuit, be given full force and effect in the instant proceedings. Many decisions point in this direction.

In *People ex rel. American Surety Co. v. Benham*, 71 Misc. 345, 128 N. Y. Supp. 610 (1911) the court stated:

> "* * * The interference of either a State court with federal jurisdiction or of a Federal court with State jurisdiction is one of such great delicacy that any conflict must sedulously be avoided so that each may carry out its functions within its proper sphere without embarrassment." 71 Misc. at 356; 128 N. Y. Supp. at 617-18.

In *Paramount Pictures v. Blumenthal*, 256 App. Div. 756, 11 N. Y. S. 2d 768 (1st Dept. 1939), appeal dismissed and certified question not answered, 281 N. Y. 682, 23 N. E. 2d 15 (1939), the plaintiff and defendant were both residents of New York. The defendant sued the plaintiff in England, and the plaintiff sought to enjoin this action. This was denied. In the course of the denial the court reasoned that the appropriate forum in which to test the effect of an alleged service of process, issued in an action brought in a court in a foreign country, was in such court, and the state

court would not pass upon the question of such foreign court's jurisdiction.

Similarly, in *West Virginia Motor Truck Ass'n* v. *Public Service Commission*, 123 F. Supp. 206 (D.S.D.W. Va. 1954), affirmed 348 U. S. 881 (1954), a federal three-judge court toward the close of its opinion stated:

> "While we do not base our decision primarily on that principle, we think the result reached is a happy one in that it respects that spirit of comity which decries undue interference between federal courts and the courts of a State." 123 F. Supp. at 216.

Leszynski v. *Russ*, 192 F. Supp. 422 (D.Md. 1961), involved a new Maryland statute which purported to authorize substituted service on non-resident owners of watercraft. The defendant filed a special preliminary defense attacking the court's personal jurisdiction over the defendant by this substituted service. District Judge Chestnut overruled this special defense, although without prejudice.

In *In re Commercial Nat. Bank*, 45 F. Supp. 482 (D.E.D. Pa. 1942), affirmed sub nom *In re Reed*, 134 F. 2d 172 (3d Cir. 1943), the court observed:

> "Principles of comity require that the national courts and the state courts should function as a harmonious and unified system in the administration of law; * * *" 45 F. Supp. at 485.

Comity has various other applications. It is applicable to decisions between federal courts in different districts. See, *e.g.*, *General Motors Corp.* v. *Bendix Aviation Corp.*, 123 F. Supp. 506 (D.N.D. Ind. 1954).

It persuades courts to let that tribunal which first has property, to adjudicate with reference to it. See *e.g.*, *In re Bean*, 207 App. Div. 276, 201 N. Y. S. 827 (4th Dept. 1923), aff'd 238 N. Y. 618, 144 N. E. 916 (1924).

In *Haag* v. *Barnes*, 11 A. D. 2d 430, 207 N. Y. S. 2d 624 (1st Dept. 1960), an Illinois agreement by which a putative father paid a certain sum for release from all legal liability, was sustained in New York and a New York paternity suit complaint was dismissed. The court stated:

> "* * * If no policy of the forum is offended, comity and good morals require recognition of the agreement, * * *." 207 N. Y. S. 2d at 628.

In *Halladay* v. *Worthington*, 99 Misc. 141, 156, 163 N. Y. Supp. 362, 371 (1916), the court stated:

> "* * * Where the act done is valid in the state where the parties are, and where the personal property is, it must be held to be valid in the courts of that state, and also by international comity in the courts of the other states."

In *Universal C.I.T. Corp.* v. *Vogt*, 165 Neb. 611, 86 N. W. 2d 711 (1957), in allowing an Oklahoma chattel mortgage to prevail over a Nebraska judgment creditor, the court held and said: "In *Kenny Loan Finance Co.* v. *Summer*, 159 Neb. 57, 65 N. W. 2d 240, this court held: 'Ordinarily, foreign law or valid rights based thereon will be given effect or enforced under the doctrine of comity unless opposed to the settled public policy of the forum.'" 165 Neb. at 618.

Comity exists as well between courts of different countries. For example, in *Hartens* v. *Hartens*, 284 N. Y. 363 (1940), the New York Court of Appeals held and said:

> "Judgment of courts of foreign countries are received in evidence in our courts when duly authenticated but they differ from judgment of courts of our sister States to which by constitutional mandate, full faith and credit must be given. They must not contravene our public policy." At 365.

There is even a comity of nations which applies to the acts of foreign states. For example, in *Anderson* v. *N.V. Transandine Handelmattschapij*, 289 N. Y. 9 (1942), the New York Court of Appeals held and said:

> "* * * By comity of nations, rights based upon the law of a foreign state to intangible property, which has a situs in this State, are recognized and enforced by the courts of this State, unless such enforcement would offend the public policy of this State. That rule is part of the law of this State, as it is, in general, the law of all countries which accept the rule of law." * * *". At 19.

Accord: *Horn* v. *Vassen*, 263 App. Div. 669, 34 N. Y. S. 2d 265 (1st Dept. 1942) (movable assets in this jurisdiction) ("The plaintiffs are clearly entitled to an accounting both under the laws of Germany and of this State").

The doctrine of comity should apply with even greater strength between our state and federal courts. After all, they are all courts of the same unified federal system. When a case moves from a state to a federal court, and then back to the state court, it should carry with it the procedural determinations in each of the preceding tribunals. *Cf. Kennedy* v. *Falk*, 230 F. 2d 362 (7th Cir. 1956).

C.

The law of the case also requires that Chief Judge Bruchhausen's order substituting the respondents for the never-existent Beland Realty Corporation, with the support of the Court of Appeals for the Second Circuit, be given full force and effect.

Our federal and state governments are but parts of one integrated governmental system. Taken together they form the government of one federal state. Under our close-knit federal system, federal courts are courts as well of the states in which they sit. As the court reasoned in *Application of Wasserman*, 240 F. 2d 213 (9th Cir. 1956):

> "* * * The jurisdictional boundaries of no United States District Court cross the boundaries of a state. Each is considered a court of the particular state in which it sits and by which it is bounded. In diversity of citizenship cases, each is bound by the statutory and decisional law of the state in which it sits, even as to doctrines of law." At 214.

Thus in *Allegheny County* v. *Mashuda Co.*, 360 U. S. 185 (1959), this Court held that a federal district court in Pennsylvania could take diversity jurisdiction in a state eminent domain case involving a Pennsylvania County. The Court reasoned:

> "But adjudication of the issues of this case by the District Court would present no hazard of disrupting federal-state relations. The respondents did not ask the District Court to apply paramount federal law to prohibit state officials from carrying out state domestic policies, nor do they seek the obvious irritant to state-federal relations of an injunction against state officials. The only question for decision is the purely factual question whether the County expropriated the respondents' land for private rather

> than for public use. The District Court would simply be acting as would a court of the State in applying to the facts of this case the settled state policy that a County may not take a private citizen's land under the State's power of eminent domain except for public use." At 189-90.

Accordingly, the law of the case should be held appropriately applicable between federal and state courts sitting in the same state; for the federal courts too are state courts. Especially should the law of the case be applicable to the instant case, for the United States Court of Appeals for the Second Circuit strongly supported Judge Bruchhausen's order substituting the respondents for the never-existent Beland Realty Corporation. Indeed, the Federal Court of Appeals stated not only that Judge Bruchhausen had "clear authority" but also that it was his "manifest duty" to order the amendment.

The doctrine of the law of the case is another of the many facets of the principle of judicial finality. Like the other facets of this principle it seeks to avoid the waste of a second resolution of issues already determined.

Although the doctrine of the law of the case is particularly applicable to a tribunal of co-ordinate jurisdiction, it is not so limited. It is also applied in a reviewing court to a charge to the jury of a trial court which is not objected to. See, *e.g. Brown* v. *Du Frey*, 1 N. Y. 2d 190 (1956); *Bucken* v. *Long Island R.R. Co.*, 286 N. Y. 146 (1941); *Berner* v. *Board of Education*, 286 N. Y. 174 (1941). Or again, the law of the case is applied by a reviewing court to orders of a lower court not appealed from. See, *e.g. Foley* v. *Equitable Life Assur. Soc.*, 263 App. Div. 605, 33 N. Y. S. 2d 917 (2d Dept. 1942).

As between courts of co-ordinate jurisdiction, the court in *Schumann* v. *Loew's Incorporated*, 144 N. Y. S. 2d 27 (1955), well said "that one Justice, under the law of the case rule, may not overrule the holding of another Justice of co-ordinate jurisdiction." At 29.

The law of the case should be held particularly applicable between state and federal courts sitting in the same state. They are both state courts. Thus the law of the case as well as comity suggests that Mr. Justice Rabin should have given full force and effect to Chief Judge Bruchhausen's order substituting the respondents for the never-existent Beland Realty Corporation. Not only do the doctrines of comity and the law of the case suggest this result, but also it is pertinent to emphasize that the United States Court of Appeals for the Second Circuit strongly supported Chief Judge Bruchhausen's order, stating that he had "clear authority" for it and that it was his "manifest duty" to make it. It can even be urged that stare decisis of the most persuasive character should have weighed with Mr. Justice Rabin to tip the scale in favor of comity and the law of the case.

D.

Moreover, the disingenuous conduct of the defendants should estop them from challenging Chief Judge Bruchhausen's order substituting the respondents for the never-existent Beland Realty Corporation.

One further consideration supports the position of the petitioners with reference to the finality of Chief Judge Bruchhausen's order, and that is the disingenuous conduct of the defendants. Their conduct should estop them from challenging Chief Judge Bruchhausen's order substituting them for the never-existent Beland Realty Corporation. As

the United States Court of Appeals for the Second Circuit truly observed:

> "* * * There is no permanent prejudice to find themselves just where they should have been had they been more frank earlier as to the ownership of the realty. Nor do we see how their charge of negligent and careless prosecution of the case by their opponents gets them far, for whatever its past vicissitudes, the case remained pending and obviously must now be heard in the proper tribunal therefor." 284 F. 2d at 786.

Not only should this Court hold as a matter of law that the doctrines of comity and the law of the case supplemented by stare decisis required the Supreme Court, County of Queens, to give full force and effect to Chief Judge Bruchhausen's order substituting the defendants for the never-existent Beland Realty Corporation; but also this Court should add that the disingenuous conduct of the respondents estops them from challenging this result. *Cf. Sayles v. Northwestern Ins. Co.*, 21 Fed. Cas. No. 12,421 (C.C.R.I. 1856), where the court said with reference to a removal by a foreign insurance company to the federal court:

> "By bringing it here, he voluntarily treats it as properly commenced, and actually pending in the state court; and he cannot after it has been brought here, treat it otherwise." At 609.

This language was quoted with approval in *Farmer v. Nat'l Life Assn.*, 138 N. Y. 265, 271 (1893), which held similarly.

CONCLUSION

The principle of judicial finality as expressed in the doctrines of comity and the law of the case as well as stare decisis, plus the disingenuous conduct of the respondents, required the Queens County Supreme Court to give full force and effect to the order of the federal District Court for the Eastern District of New York substituting the respondents for the never-existent Beland Realty Corporation. Unless and until Chief Judge Bruchhausen's order was reversed by a higher federal court—in the posture of this case, this Court—it was binding in these proceedings. The instant petition for a writ of certiorari should be granted.

Respectfully submitted

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APPENDIX I

Opinion of Rabin, *J.*

(29 Misc. 2d 641, 214 N. Y. S. 2d 796)

(New York Law Journal—April 17, 1961)

The defendants "appearing specially, for the purposes of this motion only" move, pursuant to section 237-a of the Civil Practice Act, for an order dismissing the proceedings "on the ground that service of process was never made on any defendant herein, and this court, in consequence, lacks jurisdiction over the person of any and all of the * * * defendants herein."

This is an action to recover for property damage allegedly sustained on January 18, 1954, when plaintiffs were tenants of lofts in certain premises located in Queens County. They claim that through the negligence of the owner, their stock, merchandise, fixtures and other property were damaged as the result of the flow of water from a fire escape stairwell controlled by the owner of the building. The action was originally brought in this court in November, 1954, solely against "Beland Realty Corporation" which, as alleged in paragraph 2 of the complaint, was a foreign corporation organized under and pursuant to the laws of the State of New Jersey and owned the premises of which the plaintiffs were tenants.

Following the service of a copy of the summons and complaint upon Ernest Boehm, the superintendent or managing agent of the premises, the action was removed on the ground

of diversity of citizenship to the United States District Court for the Eastern District of New York. The petition of "Beland Realty Corporation" was verified on January 3, 1955, by Joseph W. Levin, who stated he was its assistant secretary. In his affidavit sworn to the same date, he stated that this corporation was in existence pursuant to the laws of the State of New Jersey. The answer thereafter served by said defendant denied the material allegations of the complaint, including paragraph 4 thereof, wherein, as already noted, its corporate existence under the New Jersey law was alleged as well as its ownership of the premises at the time of the occurrence underlying the action.

On December 10, 1956, the action was dismissed for lack of prosecution. It was restored to the calendar in 1959, and at a pre-trial conference held thereafter an order was made setting the case down for trial on May 18, 1959, to determine whether "Beland Realty Corporation, designated in the complaint as a New Jersey corporation, may be held legally or otherwise responsible because of its alleged ownership, operation, maintenance and control of premises designated in plaintiffs' complaint * * * for an occurrence which allegedly took place on January 18, 1954 * * * " Such a preliminary trial was never held.

On June 17, 1960, the plaintiffs filed a motion "for an order amending the title of this action by substituting [the movants herein] Myrtle G. Hirsch, Lenore Benedek, Janet Benedek, Gladys Cohen and Howard Hirsch, d/b/a Beland Realty Company as party defendants in place of the defendant Beland Realty Corporation * * * ." This motion was granted and an order made and entered on October 10,

1960, returning the case to this court inasmuch as the members of the partnership, substituted as defendants, were residents of New York and thus diversity of citizenship no longer was present (Adams v. Beland Realty Corp'n, 187 F. Supp. 680).

On October 19, 1960, the United States Court of Appeals for the Second Circuit dismissed the appeal from the foregoing disposition for lack of an appealable order. Thereupon a proceeding, on petition, for a writ of mandamus was instituted in said Circuit Court to compel the judge who made the order of October 10, 1960, to vacate it. This petition was denied by a divided court (Hirsch v. Bruchhausen, 284 F. 2d 783). An application for a stay pending a writ of certiorari to the Supreme Court of the United States was denied by one of its justices on December 12, 1960.

According to a photostatic copy of a certificate of the secretary of state of New Jersey, dated May 1, 1959, annexed to the moving papers on the motion to amend the title of this action by substituting the movants as party defendants, no corporation named "Beland Realty Corporation" was ever incorporated under the laws of that state nor was it a foreign corporation authorized to transact business therein. A photostatic copy of a certificate of the Department of State of New Jersey, dated March 24, 1953, also annexed, shows that a corporation of that state, known as "Beland Realty Corporation of New Jersey" was dissolved on May 1, 1952, the certificate thereof having been filed on March 24, 1953. This corporation never owned the premises wherein the plaintiffs allegedly sustained the damages sought to be recovered in this action. All of its issued capital

stock, however, was owned by "Beland Realty Corporation" which had been incorporated in the state of New York on February 28, 1946. This corporation was dissolved by a certificate of dissolution dated May 1, 1952, a photostatic copy of which was also annexed, filed with the Department of State of New York on March 10, 1953.

It was the New York corporation which owned the premises in question until May 1, 1952, when it conveyed the same by deed dated that day (and recorded in the register's office in Queens County on August 18, 1952), to the movants herein, doing business as "Beland Realty Co.," a partnership organized and operating under the laws of the State of New York pursuant to a "Certificate of Partners" executed by them on May 1, 1952, pursuant to section 449 of the Penal Law. Photostatic copies of such deed and certificate were attached to the papers submitted in opposition to the foregoing motion. It is claimed in one of the reply affidavits herein that the very leases of the plaintiffs showed that a partnership was their landlord. A photostatic copy of one of such leases, dated January 30, 1953, to the plaintiff Louis Rait, Inc., likewise annexed to the papers on the motion to amend, shows that the landlord was "Beland Realty Co. of New York, a partnership with an office at 54 Clark Street, Newark, New Jersey."

Thus on January 18, 1954, when the plaintiffs sustained the alleged damages sought to be recovered in this action, the movants, members of a New York partnership, all residing in the State of New York owned the premises occupied by the plaintiffs; "Beland Realty Corporation," the original defendant designated in the summons and com-

plaint, had no corporate existence: "Beland Realty Corporation of New Jersey," dissolved in May 1, 1952, never owned the premises in question, although its capital stock had been owned by "Beland Realty Corporation" organized under the laws of the State of New York; that corporation was the record owner of the property until it was dissolved on May 1, 1952, when it conveyed said property to the movants as partners. Never having been served with process in this action in the manner provided by section 222-a of the Civil Practice Act, they urge that this court never acquired jurisdiction over their persons and consequently the personal judgment sought against them herein is beyond its power to grant.

While the plaintiffs make no claim that any of the movants was ever served with original process, they take the position that the order of the Federal Court substituting defendants is res judicata and conclusive on the question of jurisdiction over the persons of the present defendants.

But, "The common-law doctrine of res judicata, designed to bar relitigation of adjudicated issues, * * * is that an *existing final judgment rendered upon the merits* by a court of competent jurisdiction, is binding upon the parties and their privies in all other actions or suits on points and matters litigated and adjudicated in the first suit or which might have been litigated therein * * *" (Israel v. Wood Dolson Co., 1 N. Y. 2d 116, 118; emphasis supplied). It is clear that the order of the Federal Court amending the title of the action and substituting party defendants under its procedure was in no sense a final judgment rendered upon the merits (Bannon v. Bannon, 270 N. Y. 484). As stated in Webb v. Buckelew (82 N. Y. 555, 560), cited in Bannon

(supra); "* * * it is 'only a final judgment upon the merits, which prevents further contest upon the same issue, and becomes evidence in another action between the same parties or their privies. Until final judgment is reached the proceedings are subject to change and modification; are imperfect, and inchoate, and can avail nothing as a bar, or as evidence, until the judgment, with its verity as a record, settles finally and conclusively the questions at issue. An interlocutory order is not such a judgment. It is not a judgment at all.'"

It is this court's opinion that the order amending the title of this action by substituting the movants for the original corporate defendant was no more than order of a court made in the course of the same action [Judge Clark noted in the prevailing opinion of the Circuit Court: "* * * our function has been merely to pass on the procedural aspects of the proceedings as brought before us" (Hirsch v. Bruchhausen, 284 F. 2d at p. 787)]. The numerous Federal and New York cases relied upon by the plaintiffs are not to the contrary. In all of them, the facts clearly establish that the courts were concerned with the effect of a determination in an independent prior action or proceeding and not, as here, with an order in the same action.

Nor is the doctrine of the "law of the case" applicable here. As noted in Walker v. Geril (257 App. Div. 249, 251): "The law of the case, like the principle of stare decisis, is a rule of comity or convenience (Luminous Unit Co. v. Freeman-Sweet Co., 3 F. [2d] 577). Since from its very nature it involves the effect of orders which are interlocutory, it

must be distinguished from res adjudicata (Bannon v. Bannon, 270 N. Y. 484). Accordingly, its effect is limited to a court of coordinate jurisdiction which ordinarily should not disregard an earlier decision on the same question in the same case." "It must be accommodated to the needs of justice by the discriminating exercise of judicial power" (Reamer's Estate, 331 Pa. 117, 122; 21 C. J. S., Courts, sec. 195 p. 334). In Rager v. McCloskey (305 N. Y. 75, 78), the Court of Appeals stated that the doctrine of law of the case, as distinguished from res judicata "is, therefore, not binding upon this court."

While this court claims no right to review a determination of a Federal District Court, it does assert its exclusive power to determine its own jurisdiction over persons upon whom no service of process in accordance with New York's standards was ever made (see Erickson v. Macy, 231 N. Y. 86). As was stated in Matter of Brenner v. Great Cove Realty Co. 16 N. Y. 2d 435, 441-442): "[i]t is settled beyond cavil that a court has jurisdiction to determine the facts upon which its jurisdiction depends (Matter of United States of Mexico v. Schmuck, 294 N. Y. 265, 271-273; Consumers Lbr. Co. v. Lincoln, 225 App. Div. 484, 485; Stoll v. Gottlieb, 305 U. S. 165, 171-172; United States v. Mine Workers, 330 U. S. 258, 289-295; 21 C. J. S., Courts, sec. 113)."

Section 222 a of the Civil Practice Act, added in 1945, permits the prosecution of an action or proceeding by or against a partnership in the partnership name. It provides, in pertinent part, that if the persons carrying on business as partners "be defendants in an action or proceeding, the summons or other process may be served upon any one or

more of them with like effect as though all of the persons had been named as defendants by their own respective names." As already noted, not one of the substituted defendants was ever served with a summons in this action and no such service is claimed by the plaintiffs nor the waiver thereof. It is an ancient rule since Pennoyer v. Neff (95 U. S. 714) that personal service within a state where suit is brought, or the waiver of such service, is required for due process of law to support a personal judgment.

In no aspect can it be said that the situation here presented involves a mere misnomer of the party defendants which would permit the correction of the name. The plaintiffs initially sued "Beland Realty Corporation" which they alleged had its corporate existence in New Jersey. There was no such named corporation, although there was one named "Beland Realty Corporation of New Jersey." The substitution of the latter because of misnomer would have been permissible under New York law, but it never owned the property. A New York corporate entity named "Beland Realty Corporation" owned it until May 1, 1952, as well as the stock of the New Jersey corporation, but this New York corporation was never sued. None of the movants was, according to that corporation's certificate of dissolution, its officers and directors, although a comparison of the names and addresses therein listed with those of the movant's "Certificate of Partners" shows that several were related and resided at the same post office addresses. As was stated by the Appellate Division of the First Department in Abrams v. General Financial Corp'n (274 App. Div. 756, 757): "There is no authority which sanctions an entire

change of name of the defendant or defendants by the substitution of other and entirely different defendants for the one actually served (New York State Monitor Milk Pan Assn. v. Remington Agric. Works, 89 N. Y. 22; Gray v. Vought & Co., 216 App. Div. 230). The court is without power to permit such a substitution, particularly where, as here, it might operate to deprive appellants of the right to plead as a bar to the action that the Statute of Limitations had become effective against plaintiff's claim since the commencement of the action against the corporation (Gray v. Vought & Co., supra, p. 233)."

And so here, the movants cannot be substituted as party defendants in this action for the corporation that the plaintiffs intended to sue in November 1954. In Safrin v. Friedman Hat Company (195 Misc. 387, appeal dismissed 276 App. Div. 853), the court denied the substitution of a partnership with same name as the corporation as party defendant where, as here, the statute of limitations had already barred the claim. The court noted at page 389: "The individual, Joe Friedman, was not a party to this action although the service was made upon him as president of the named corporate defendant. Plaintiff now wishes to substitute Joe Friedman and another as copartners. This would amount to the substitution of entirely different defendants."

Following the denial to substitute the partners for the corporation in Safrin, the plaintiffs commenced a new action against the partners. These defendants moved to dismiss the complaint under Rule 107 of the Rules of Civil Practice solely upon the ground that the alleged causes of action were barred by the applicable statute of limitations.

Mr. Justice Beldock, now an associate justice of the Appellate Division of the Second Department, pointed out in his opinion (Safrin v. Friedman, 96 N. Y. S. 2d 627, aff'd 277 App. Div. 1138) that certain conduct on the part of the defendants in the prior action against the corporation, may be sufficient upon the trial to estop these defendants from availing themselves of the statute of limitations as a bar. Accordingly, he held that: " * * * the interests of justice will best be served by a denial of the motion to dismiss, by the interposition of an answer setting forth the defense of the statute of limitations and by a trial of the issue of estoppel."

A similar trial on the issue of estoppel to assert the bar of the statute of limitations may be available to the plaintiffs on the basis of the conduct outlined in the opinion of the District Court (187 F. Supp. at pp. 681-682) in the pending action in the Supreme Court, New York County, for the same cause brought against the individual defendants in January, 1960.

So far as the instant action is concerned, this court, for the reasons stated, has no jurisdiction over the persons of the individual defendants to grant the in personam judgment here sought.

The motion is granted accordingly.

Settle order.

APPENDIX II

Decision of Bruchhausen, *J.*, Dated September 22, 1960

(187 F. Supp. 680)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

BRUCHHAUSEN, C. J.

This motion is brought pursuant to Rule 15 and Rule 4(h) of the Federal Rules of Civil Procedure to amend the title of this action by substituting Myrtle G. Hirsch, Lenore Benedek, Janet Benedek, Gladys Cohen and Howard Hirsch; d/b/a Beland Realty Company, as party defendants, in place of Beland Realty Corporation.

On January 18, 1954, the plaintiffs allegedly sustained property damage as a result of the flow of water into premises occupied by them as tenants of 32-02 Queens Boulevard, Long Island City, New York, through the negligence of the owner of said premises. The summons and complaint were served upon Ernest Boehm, the superintendent or managing agent of the premises. The complaint described the defendant owner as a New Jersey corporation. The action originally was commenced in Queens County Supreme Court. The defendant denied ownership, operation and control of the premises. It thereupon sought removal of

Appendix II

Decision of Bruchhausen, J., Dated September 22, 1960

the action to this court because of diversity of citizenship. The removal petition was signed by Joseph W. Levin, assistant secretary of Beland Realty Corporation of New Jersey. In his affidavit of January 3, 1955, Mr. Levin alleged that the corporation was in existence pursuant to the laws of the State of New Jersey. However, a certificate of voluntary dissolution was filed May 1, 1952. The stock of this corporation was owned by a New York corporation known as Beland Realty Corporation. This New York corporation owned the premises in question up to May 1, 1952 when it was dissolved. Its property was transferred to the individuals named above d b a Beland Realty Company, a partnership. The defendant corporation was represented at first by the law firm of Golenbock and Barell and then by Max J. Gwertzman, the subrogation attorney. Extensions of time to appear and answer were given to both attorneys. Examinations before trial of both parties were held and the case placed on the trial calendar. At the pre-trial call before Judge Savage the corporation moved for dismissal of the complaint on the ground of nonownership, management or control. At that pre-trial, a deed was exhibited by counsel from the corporation to the partnership transferring the premises to the named individuals. All proceedings were conducted in the name of the dissolved corporation although dissolution was approximately two years prior to the cause of action. All notice of claims and pleadings were turned over to the attorneys for the partnership who in turn forwarded them to the attorneys for the insurance company.

Appendix II

Decision of Bruchhausen, J., Dated September 22, 1960

The defendant contends that a granting of this motion would constitute a substitution of a new party and thereby deny the defendant partnership the benefit of the statute of limitations. Numerous cases are cited by the defendant in support of its contention. However, a careful reading of these cases discloses that they are distinguishable from the case at bar. In the cited cases, the party to be substituted was new; one who had not been served, one who had not appeared in the action nor participated therein. In the case at bar the parties involved knew from the beginning of the alleged claim, the defendant was given additional time to answer, all preliminary examinations were conducted by both sides. Truly, the parties were before the court. In Green v. Walsh, 21 F.R.D. 15, the court held in part:

> "The granting or denial of an application to amend, in a situation where amendment may be made only by leave of the court, is within the discretion of the trial judge. Moore's Federal Practice, Vol. 3, ¶ 15.08, pp. 833-834; Heay v. Phillips, 9 Cir., 1952, 201 F. 2d 220, 222; Young v. Garrett, 8 Cir., 1947, 159 F. 2d 634; Lorentz v. R.K.O. Pictures, 9 Cir., 1946, 155 F. 2d 84, 88, certiorari denied 329 U.S. 727, 67 S. Ct. 81, 91 L. Ed. 629; Wittmayer v. United States, 9 Cir., 1941, 118 F. 2d 808, 809; Hirshhorn v. Mine Safety Appliances Co., D.C.W.D. Pa. 1951, 101 F. Supp. 549, 552, affirmed 3 Cir., 193 F. 2d 489."

The court added:

> "The rule is to be liberally construed on the side of allowance of amendments, particularly where the opposing party is put to no disadvantage." Barthel v. Stamm, 5 Cir., 1955, 145 F. 2d 487, 490; Hammond-Knowlton v. United States, 2 Cir., 1941, 121 F. 2d

192, 200, certiorari denied 314 U. S. 694, 62 S. Ct. 410, 86 L. Ed. 555; International Ladies' Garment Workers' Union v. Donnelly G. Co., 8 Cir., 1941, 121 F. 2d 561, 563; Fli-Fab, Inc. v. United States, D.C.D.R.I. 1954, 16 R.F.D. 553, 556; Hirshhorn v. Mine Safety Appliances Co., D.C.W.D. Pa. 1951, 101 F. Supp. 549, 552, affirmed 3 Cir., 193 F. 2d 489; Overfield v. Pennroad Corp., D.C.E.D. Pa. 1941, 39 F. Supp. 482, 486-487."

The court further added:

"And, the spirit of the Federal Rules demands that insofar as possible, controversies be determined upon the merits and not upon procedural niceties. Moore's Federal Practice, Vol. 3, § 15.08, p. 828; Copeland Motor Co. v. General Motors Corp., 5 Cir., 1952, 199 F. 2d 566, 567-568; Fli-Fab, Inc. v. United States, D.C.D. R.I. 1954, 16 F.R.D. 553, 556; Hirshhorn v. Mine Safety Appliances Co., D.C.W.D. Pa. 1951, 101 F. Supp. 549, 552, affirmed 3 Cir., 193 F. 2d 489; Fierstein v. Piper Aircraft Corp., D.C.M.D. Pa. 1948, 79 F. Supp. 217, 218; Overfield v. Pennroad Corp., D.C.E.D. Pa. 1941, 39 F. Supp. 482, 485."

In the case of Nelson v. Jadrijevics, 59 F. 2d 25, an amendment correcting the mistaken allegation that the person employing the plaintiff was a corporation, instead of a partnership, held properly allowed.

Rule 4(d) (3) provides how service shall be made upon corporations and partnerships 'or unincorporated associations.' Mr. Boehm who was served cannot be classified as a mere janitor. His examination before trial clearly indicates that Mr. Boehm as superintendent was in charge of the

premises and of men working under his direction. He was served by the plaintiff and gave the papers to the partners who acted upon them. The partnership continuously participated in the proceedings. The corporation never moved for a dismissal as being the wrong party, but in reality conducted the entire defense until it made its motion to dismiss before Judge Savage, after the statute of limitations had expired. It is evident that no prejudice will flow to the defendant from a granting of this motion. Under Rule 15(c) of the Federal Rules of Civil Procedure amendments relate back to the date of original pleading. The cases are in accord that amendments to pleading relate back, that the issues are to be determined on their merits and mere technicalities are to be disregarded. Godfrey v. Eastern Gas & Fuel Associates, 71 F. Supp. 175; Williams v. Pennsylvania R. Co. et. al., 91 F. Supp. 652.

In the interest of justice, courts are to apply liberal rules in permitting amendments. Bainum v. American Bridge Co. of N. Y., 141 F. 179. Rule 15(a) of the Federal Rules of Civil Procedure referring to amended and supplemental pleadings provides in part:

> "* * * and leave shall be freely given when justice so requires."

See also Bowles v. Marx Hide & Tallow Co., 4 F.R.D. 297; Porter v. Theo. J. Ely Mfg. Co., et al., 5 F.R.D. 317.

The defendant alleges that it will lose the defense of the statute of limitations if this motion is granted. The courts have held under similar circumstances where a party had notice of a claim from the beginning the statute does not

apply. Tiller v. Atlantic Coast Line Railroad Co., 323 U. S. 574; Maty v. Grasselli Co., 303 U. S. 197.

The defendants contend that the plaintiff is chargeable with laches and, therefore, barred in making this motion. It is well settled that delay in and of itself is not a sufficient ground to defeat this type motion. It is necessary that the opposing party be prejudiced. County Theatre Co. v. Paramount Film Distributing Corp., 166 F. Supp. 221; Arnold v. Chesebrough, 33 Fed. 571; Fli-Fab, Inc. v. United States of America, 16 F.R.D. 553.

In substituting the partnership in place of the corporation, diversity of citizenship is no longer present. The partnership is a New York organization against which there is pending the identical suit in Supreme Court, New York County. Under these circumstances, the case should be remanded. See Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 131 F. Supp. 262.

The plaintiff's motion is granted and the case remanded.

Settle order on notice.

WALTER BRUCHHAUSEN
Chief Judge

APPENDIX III

Opinion of United States Court of Appeals (284 F. 2d 783)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

October Term, 1960.

(Submitted October 31, 1960

Decided November 29, 1960.)

Docket No. 26597

MYRTLE G. HIRSCH, LENORE BENEDEK, JANET BENEDEK, GLADYS COHEN, and HOWARD HIRSCH, doing business as BELAND REALTY COMPANY,

Petitioners,

—v.—

HON. WALTER BRUCHHAUSEN, United States District Judge for the Eastern District of New York,

Respondent.

Before:

CLARK, MAGRUDER and FRIENDLY,

Circuit Judges.

Petition for a writ of mandamus to the Honorable Walter Bruchhausen, United States District Judge for the Eastern District of New York. Petition denied.

Appendix III
Opinion of United States Court of Appeals

LEONARD W. WAGMAN, of Golenbock and Barell, New York City, *for petitioners.*

MARTIN ROSEN, New York City, for William J. Adams, d/b/a Beacon Hill Company, Coral, Inc., and Louis Rait, Inc., *in opposition.*

CLARK, *Circuit Judge*:

The petitioners herein seek a writ of mandamus to compel Judge Bruchhausen to vacate an order substituting them as the parties defendant in an action pending before him in the Eastern District of New York. The petition was filed a few days after we had dismissed a direct appeal from the order for lack of a final judgment. Involved also is an unappealable[1] order of remand of the action to the state court from which it had originally been removed, since the substitution of parties destroyed diversity of citizenship. Defendants, relying on a claim that the district court has not secured jurisdiction over them, vigorously press their contention for a review of this issue by mandamus as the only means available to them, Judge Bruchhausen having denied their application for an interlocutory appeal under 28 U. S. C. §1292(b). But since defendants, by their own ad-

[1] "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U. S. C. §1447(d); and see *Kloeb* v. *Armour & Co.*, 311 U. S. 199, 205; *Stein's Stores* v. *Taylor*, 6 Cir., 216 F. 2d 439 (refusing review by mandamus).

mission and claim, are the real parties in interest to defend the pending action, we find their objections purely delaying and technical, not rising to the level required to justify the issuance of the extraordinary writ of mandamus.[2] The case is now in that place and that posture which are wholly appropriate and have been indicated as such from the outset; further preliminary sparring can at the utmost procure only a direction that the amended complaint be served upon the defendants, rather than upon their counsel. As we point out below, even in the doubtful event that such a direction might prove desirable, we shall not call upon the extraordinary powers of this court to permit us to indulge in so futile and useless a gesture.

The original action, *Adams v. Beland Realty Corp.*, was brought in the state court in 1954 by certain tenants of stores in an eight-story business block in Queens, New York City, against Beland Realty Corp., a New Jersey corporation, as owner. Judge Bruchhausen in his opinion below states the uncontested facts succinctly as follows:

> "On January 18, 1954, the plaintiffs allegedly sustained property damage as a result of the flow of water into premises occupied by them as tenants of 32-02 Queens Boulevard, Long Island City, New York, through the negligence of the owner of said premises. The summons and complaint were served upon Ernest Boehm, the superintendent and manag-

[2] *Abrams v. McGohey*, 2 Cir., 260 F. 2d 892; *General Houses, Inc. v. Bruchhausen*, 2 Cir., 256 F. 2d 674; *Electric & Musical Industries Limited v. Walsh*, 2 Cir., 249 F. 2d 308; *Torres v. Walsh*, 2 Cir., 221 F. 2d 319, 321, certiorari denied 350 U. S. 836; *In re Chappell & Co.*, 1 Cir., 201 F. 2d 343.

ing agent of the premises. The complaint described the defendant owner as a New Jersey corporation. The action originally was commenced in Queens County Supreme Court. The defendant denied ownership, operation and control of the premises. It thereupon sought removal of the action to this court because of diversity of citizenship. The removal petition was signed by Joseph W. Levin, assistant secretary of Beland Realty Corporation of New Jersey. In his affidavit of January 3, 1955, Mr. Levin alleged that the corporation was in existence pursuant to the laws of the State of New Jersey. However, a certificate of voluntary dissolution was filed May 1, 1952. The stock of this corporation was owned by a New York corporation known as Beland Realty Corporation. This New York corporation owned the premises in question up to May 1, 1952 when it was dissolved. Its property was transferred to the individuals named above d b a Beland Realty Company, a partnership. The defendant corporation was represented at first by the law firm of Colenbock and Barell and then by Max J. Gwertzman, the subrogation attorney. Extensions of time to appear and answer were given to both attorneys. Examinations before trial of both parties were held and the case placed on the trial calendar. At the pre-trial call before Judge Savage the corporation moved for dismissal of the complaint on the ground of non-ownership, management or control. At that pre-trial, a deed was exhibited by counsel from the the corporation to the partnership transferring the premises to the named individuals. All proceedings were conducted in the name of the dissolved corporation although dissolution was approximately two years prior to the cause of action. All notice of claims and pleadings were turned over to

> the attorneys for the partnership who in turn forwarded them to the attorneys for the insurance company." *Adams v. Beland Realty Corp.*, Civ. No. 15081, D. C. E. D. N. Y., Sept. 22, 1960.

The present proceedings was initiated by a motion thereafter made on behalf of the then plaintiffs pursuant to F. R. C. P. 15 and 4(h) to amend the title by substituting the present petitioners, doing business as Beland Realty Company, as party defendants, in place of Beland Realty Corp." The defendant contended that a granting of the motion would constitute a substitution of a new party and thereby deny the defendant partnership the benefit of the statute of limitations. But Judge Bruchhausen pointed out that here "the parties involved knew from the beginning of the alleged claim, the defendant was given additional time to answer, all preliminary examinations were conducted by both sides. Truly, the parties were before the court. * * * The partnership continuously participated in the proceedings. The corporation never moved for a dismissal as being the wrong party, but in reality conducted the entire defense until it made its motion to dismiss before Judge Savage, after the statute of limitations had expired. It is evident that no prejudice will flow to the defendant from a granting of this motion." And he granted the motion, ordering a complete substitution of parties defendant; additionally he ordered the remand to the state court, since the parties were now all citizens of New York. When the appeal from the order of substitution came before us on October 19, 1960, we granted the plaintiffs' motion to dismiss, since obviously the defendant corporation was not injured by its elimination from the lawsuit and no final action had been taken against

the substituted defendants, who now had full opportunity to defend. This petition, dated October 27, 1960, followed.

F. R. 81 (c) provides as to "Removed Actions": "These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders." See *Freeman v. Bee Machine Co.*, 319 U. S. 448, upholding amendment to state a new claim after removal. Thus Judge Bruchhausen had clear authority to order the amendment substituting parties, see F. R. 21, 25(d) (c); and it was his manifest duty to do so and to make sure that the real issue was litigated between the parties actually involved. Moreover, the defendants knew, even more than the plaintiffs, that the issue was one for the state court where (so we are told) there is already an action pending against them involving these issues. There is no permanent prejudice to them to find themselves just where they should have been had they been more frank earlier as to the ownership of the realty. Nor do we see how their charge of negligent and careless prosecution of the case by their opponents gets them far, for, whatever its past vicissitudes, the case has remained pending and obviously must now be heard in the proper tribunal therefor.

The only possible contention they have is that actually they are strangers, being newly inducted into the litigation, and hence are entitled to service of process anew.[*] Perhaps

[*] This could be had just as was the original service, by serving the superintendent at the building in Queens. F. R. 4(d) (3). If actualities may be considered, this is obviously more indirect a ful than service upon counsel under F. R. 5.

the trial judge might have been well advised to have ordered this simple and here essentially useless formality and thus have removed petitioner's last talking point. And were mandamus to issue, it would have to be limited to that one step, since every other step taken is so definitely required in equity and justice. But we do not think the writ is available for so profitless a venture. So concluding, we shall not pause to consider whether petitioners may still be entitled to raise this objection or whether they may not be foreclosed by their continued defense in the name of the corporation as owner and by their present appeal or whether in any event under the circumstances of complete knowledge which they possessed service upon their counsel is not adequate under F. R. 5. See *Fricano* v. *Bee Machine Co.*, *supra*, 319 U. S. 448, 455; *Adam* v. *Saenger*, 303 U. S. 59, 67-68. The obvious lack of any real prejudice to them makes issuance of the writ an act of supererogation.

Petitioners also seek various forms of additional relief which either are rendered inappropriate by our conclusion or are not properly available to them. Certainly we have no right or desire to control the trial judge's exercise of discretion in denying leave for an interlocutory appeal. All defenses on the merits now properly go before the state court for definitive adjudication; our function has been merely to pass on the procedural aspects of the proceedings as brought before us. We see no reason either to grant or to continue to stay prevailing the remand to the state court.

Accordingly the petition for a writ of mandamus and for other forms of relief is denied *in toto*.

Appendix III
Opinion of United States Court of Appeals

FRIENDLY, *Circuit Judge* (dissenting);

In my view the correct path here is the one Judge Clark has so clearly discerned but has then declined to follow. That is to grant the petition for mandamus to the limited extent of directing modification of the order of the District Judge to permit the service of an amended complaint upon the partnership and to leave all questions of the effect of this action to the state court. Far from that being a profitless venture, it seems to me essential not merely to protect these petitioners, whose conduct may not have been overly appealing, but to prevent unwarranted intrusion into the domain of the New York courts where the action began and where it will end.

The extract from Chief Judge Bruchhausen's opinion does not fully convey the never-never quality of this case. The action giving rise to the petition for mandamus was brought in October, 1954, in the Supreme Court, Queens County, by residents of New York, tenants under leases from the petitioners, a partnership, all but one of the partners being New York residents. Plaintiffs sought to recover for damage to their property sustained in January, 1954. The real estate records of Queens County showed, as did the leases, that the premises were owned by the partners, doing business as Beland Realty Co. Nevertheless, for reasons not disclosed or, perhaps, without them, plaintiffs brought their action against Beland Realty Corporation, a New Jersey corporation. Service was made upon the building superintendant as managing agent; under New York law, although this may have been good as against the New Jersey corpo-

ration named as defendant, it would not have been against the partnership, Civil Practice Act, §§229, 222a. Early in 1955 the New Jersey corporation removed to the federal court for the Eastern District of New York; the allegation of continued corporate existence in the removal petition was untruthful but this may not have been prejudicial to plaintiffs since the defendant's answer, filed simultaneously with the petition for removal, denied ownership, operation and control of the property and the dissolution did not remove liability for any debts the corporation had. In the federal court the action slumbered, only briefly awakened by a dismissal for want of prosecution in 1956 and subsequent restoration to the calendar, until early 1959. Then a pretrial conference was had and an order made directing a preliminary trial of the issue of liability of the corporate defendant, as distinguished from the general merits of the action. Apparently believing that such a trial would go against them, plaintiffs moved in June, 1960, to amend the caption of the action so as to make the partners defendants in lieu of the New Jersey corporation.

The obvious reason for plaintiffs' proceeding in this fashion was that the applicable statute of limitations, Civil Practice Act, §49(6), was three years. It must likewise have been apparent that granting plaintiffs' motion would immediately terminate federal jurisdiction by eliminating diversity of citizenship and would thus require remand. However, the court permitted the amendment and made clear the intended effect of this by stating, "Under Rule 15(c) of the Federal Rules of Civil Procedure amendments relate back to the date of original pleading."

Appendix III
Opinion of United States Court of Appeals

Although the order sounds in terms of "substitution" of the partners for the corporation, this is colloquial rather than technical language; "substitution," as used in F. R. Civ. Proc. 25, refers to cases where one person has been clothed with the rights or liabilities of another. The motion was rather for amendment of the complaint under Rule 15 and of the summons under Rule 4(h).

When a summons is originally served in the federal court and the action is to remain there, the test whether such an amendment should be allowed has been stated to be "whether, on the basis of an objective standard, it is reasonable to conclude that the plaintiff had in mind a particular entity or person, merely made a mistake as to the name, and actually served the entity or person intended; or whether plaintiff actually meant to serve and sue a different person." 2 Moore, Federal Practice (2d ed. 1948), p. 1042. See, allowing amendment, *United States* v. *A. H. Fischer Lumber Co.*, 162 F. 2d 872 (4th Cir. 1947); *Grandey* v. *Pacific Indemnity Co.*, 217 F. 2d 27 (5th Cir. 1954); *Taormina Corp.* v. *Escobedo*, 254 F. 2d 171 (5th Cir.), cert. denied, 358 U. S. 827 (1958); *Jackson* v. *Duke*, 259 F. 2d 3 (5th Cir. 1958); not allowing amendment, *Kerner* v. *Rackmill*, 111 F. Supp. 150 (M. D. Pa. 1953); *Harris* v. *Stone*, 115 F. Supp. 531 (D. C. 1953). The confused record here leaves it questionable whether plaintiffs brought themselves within this test, and the opinion of the district judge affords no indication that he applied it.

However, I do not reach that issue since I think what was done to have been improper even if that point should be

taken in plaintiffs' favor. The summons was served on the superintendent while the action was in the New York courts. Under Civil Practice Act, §222a, that would not have been good service against the partnership even if the summons has named the partners in the first instance. I cannot read F. R. Civ. Proc. 81(c), whereby the Federal Rules "apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal," as permitting a federal court to combine rules 4(d)(3) and (h) so as to impart retroactive validity to a state court summons where the defect was not merely improper description but improper service. In this respect the case seems to me to fall under the principle of *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.*, 258 U. S. 377 (1922), rather than of *Freeman* v. *Bee Machine Co. Inc.*, 319 U. S. 448 (1943), see *Bomze* v. *Nardis Sportswear, Inc.*, 165 F. 2d 33, 35 (2d Cir. 1948). However, if a federal court does have the power to perform this Lazarus-like feat, how singularly inappropriate to use it here, where, at the moment of exercising jurisdiction to breathe into the New York summons a vitality over the partners which the summons could never have had in New York, the federal court lost the very jurisdiction it was exerting!

When we get behind the procedural niceties of amendment and fictions of relation back and the fascinating metaphysical inquiry how a court can exercise a power the basis for which is destroyed by the act of exercise, one stark truth emerges. The real dispute between these litigants is whether plaintiffs should be allowed to begin formal pursuit of the individual defendants more than three years after

the cause of action accrued. See *Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231, 233 (1959); *Fitzgerald's Estate*, 252 Pa. 568, 97 Atl. 935 (1916); Dawson, Estoppel and Statutes of Limitation, 34 Mich. L. Rev. 1 (1935). This is a controversy, mainly between residents of New York, in an action begun in the courts of New York and now being returned there, and actually being litigated in another action brought by the plaintiffs against the individual defendants in the Supreme Court, New York County, in January, 1960. The only interest a federal court may legitimately take in this controversy among residents of New York is to take no interest. If plaintiffs no longer wish to pursue the New Jersey corporation in the federal court, well and good; but the federal court should restore the action to the state court in a fashion that will leave the state court free to determine the case as the state court sees fit, see *Waco* v. *Fidelity & Deposit Co.*, 293 U. S. 140 (1934), and not impose its own views on a matter purely of state cognizance[1] and in a manner conclusive on the state court and, so far I can see, unreviewable anywhere. Failure by the district court to do this is precisely the kind of situation calling for mandamus. 6 Moore, Federal Practice (2d ed. 1953), p. 59.

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[1] We are told that under New York practice, 'As to new parties defendant brought in by an amendment, a suit is begun only when they are brought in by the amendment and the service of the amended process.' 2 Carmody-Wait, Cyclopedia of New York Practice (1952), p. 343. See *Gray* v. *H. H. Vought & Co.*, 216 App. Div. 230 (1st Dept. 1926); *Abrams* v. *General Financial Corp.*, 274 App. Div. 756 (1st Dept. 1948).

APPENDIX IV

Order of Affirmance of Appellate Division

At a term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Second Judicial Department at the Borough of Brooklyn, on the 13th day of November, 1962.

Present—

HON. HENRY L. UGHETTA,
Acting Presiding Justice.
" MARCUS G. CHRIST,
" ARTHUR D. BRENNAN,
" L. BARRON HILL,
" JAMES D. HOPKINS,
Justices.

WILLIAM J. ADAMS, d/b/a BEACON HILL COMPANY, ET AL.,
Appellants,

—v.—

MYRTLE G. HIRSCH, ET AL.,
Respondents.

ORDER ON APPEAL FROM ORDER

The above named William J. Adams, d/b/a Beacon Hill Company, Coral, Inc., and Louis Rait, Inc., plaintiffs in this

action having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court entered in the office of the Clerk of the County of Queens on the 15th day of May, 1961, which granted defendants' motion, made pursuant to section 237a of the Civil Practice Act, to dismiss the action on the ground that process had not been served on any of the defendants and that the court was without jurisdiction, herein, and the said appeal having been argued by Mr. O. John Rogge of Counsel for the appellants and argued by Mr. Leonard W. Wagman of Counsel for the respondents, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed:

It is Ordered and Adjudged that the order so appealed from be and the same hereby is unanimously affirmed, without costs.

Enter.

JOHN J. CALLAHAN,
Clerk.

APPENDIX V

Denial of United States Supreme Court for Stay

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON 25, D. C.

December 12, 1960

Leonard W. Wagman, Esquire
60 East 42nd Street
New York 17, N. Y.

Re: *Myrtle G. Hirsch, et al., v. United States Court of Appeals for the Second Circuit*

Dear Sir:

Your application for stay, together with opposition thereto, in the above-captioned cause was presented to Mr. Justice Harlan, who has today denied the application with the following endorsement thereon:

> "I can find no equity in this application nor any other reason for granting the stay which the Court of Appeals has denied. Application denied.
>
> 12 12 60 JMH."

Very truly yours,

JAMES R. BROWNING, CLERK
By /s/ E. P. CULLINAN
E. P. Cullinan
Deputy

EPC: jmh
cc: Martin Rosen, Esquire
170 Broadway
New York 38, N. Y.

A. Daniel Fusaro, Esquire
Clerk, U.S. Court of Appeals
for the Second Circuit
New York 7, N. Y.

RARY
T. U. S.

Office Supreme Court, U.S.
FILED
MAR 11 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 800

WILLIAM J. ADAMS, d/b/a BEACON HILL COMPANY, CORAL, INC. and LOUIS RAIT, INC.,

Petitioners,

against

MYRTLE G. HIRSCH, LENORA BENEDEK, JANET BENEDEK, GLADYS COHEN and HOWARD HIRSCH, d/b/a BELAND REALTY COMPANY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Attorney for Respondents,
60 East 42nd Street,
New York 17, New York.

LEONARD W. WAGMAN, ESQ.,
of Counsel.

INDEX

	PAGE
Preliminary Statement	1
Corrected Statement of the Case	2
Corrected Statement of the Questions Presented	10
Argument	11
I—The decision of the state court as enunciated by Mr. Justice Rabin at Special Term and unanimously confirmed by the New York Appellate Division, rested solely upon the ground of state procedure and practice and correctly applied the New York law. It is axiomatic that such a decision does not present a federal question	12
II—The complaint in this action is not founded upon any claimed federal right; petitioners are incorrect in urging as a substantial federal question the refusal of the state court to be bound either by the doctrine of "comity" or "law of the case" to the district court's decision on the motion to amend	15
Conclusion	20

Table of Cases Cited

Adams v. Beland Realty Corp., 187 F. Supp. 680 (E. D. N. Y. 1960)	5
Adams v. Hirsch, 29 Misc. 2d 641, 214 N. Y. S. 2d 796	7, 10, 14
Allen v. Alleghany Co., 196 U. S. 458, 49 L. Ed. 551	19
Ayres v. Wiswall, 112 U. S. 187, 38 L. Ed. 695	17
Bear River Drainage District, In re, 267 F. 2d 849 (10th Cir. 1959)	17
Bonze v. Mardis Sportswear, Inc. (2nd Cir. 1948), 165 Fed. 2d 33	15, 16

PAGE

Erickson v. Macy, 231 N. Y. 86 14

Finney v. Guy, 189 U. S. 335, 47 L. Ed. 839, 23 Sup. Ct. 558 19

Lambert Run Coal Co. v. Baltimore & Ohio Ry. Co., 258 U. S. 377, 42 S. Ct. 349, 66 L. Ed. 671 15

Ragen v. McCloskey (305 N. Y. 75) 18

Shaw v. Wendy Wilson, Inc. (D. C. S. D. N. Y. 1959), 171 Fed. Supp. 117 15

Ultra Sucro Co. v. Illinois Water Treatment Co. (D. C. S. D. N. Y. 1956), 146 Fed. Supp. 393 15

U. S. v. Rice, 327 U. S. 749, 66 S. Ct. 838 17

Statutes Cited

Federal Rules of Civil Procedure, Rule 4(d)(3) 9

New York Civil Practice Act:

Section 222-a 9, 10, 14

Section 237-a 6, 10, 13

28 U. S. C. 1257 11

Other Authorities Cited

Black's Law Dictionary, 4th ed., p. 1030 18

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

This case does not involve a question of federal law—much less a substantial question of federal law—as would warrant the granting of a writ of certiorari. There are neither federal constitutional nor federal statutory principles involved herein; neither does the record draw into question any federal title, right, privilege or immunity. When stripped of all its factual complexities, this case involves simply a question of local procedural law in the New York State courts, presented in the context of the controlling provisions of the New York Civil Practice Act, as uniformly construed and applied by the New York State courts in the case at bar. It is axiomatic that the New

York State court's interpretation of the New York State Civil Practice Act is the final word on such a question, as presented by the instant record.

All that this case involves is whether upon the record below the New York State court was powerless to insist upon compliance with the provisions of the New York State Civil Practice Act requiring that in actions against a partnership—it is a jurisdictional prerequisite, which cannot be dispensed with—that one of the partners actually be served with process. This true nature of the issue herein has been glossed over by the petition, but instantly comes into focus when reference is made to the actual record and the opinion of the State court.

Corrected Statement of the Case

This case already has nearly a 9-year history, primarily because of the haphazard and dilatory fashion in which it has been prosecuted by petitioners (plaintiffs below);—indeed, petitioners took 16 months before they pursued an appeal to the Appellate Division of the New York State Supreme Court from the decision which gives rise to the instant petition. In a further effort to keep this stale litigation alive, petitioner has generated spurious questions seeking to convert an adjudication concerning the requirements of service of process under the New York State Civil Practice Act as somehow involving a question of substantive law—indeed, of federal constitutional law. Since petitioners' presentation of the facts has been selective, and to facilitate comprehension of the true question, we submit the following factual recital.

This case was commenced by the service of a summons and complaint on or about October 26, 1954, said service being made upon the superintendent of certain premises located in the County of Queens, City and State of New York.

The complaint alleged causes of action which had arisen in January 1954 when property belonging to the plaintiffs had allegedly been damaged by water at the aforesaid premises where plaintiffs were tenants.

There was only one defendant named in the original summons and complaint, to wit, "Beland Realty Corporation." The Beland Realty Corporation thus named as defendant was described in the complaint as follows:

> "2. On information and belief that at all the times hereinafter mentioned the defendant Beland Realty Corporation was and still is a Foreign Corporation organized under and pursuant to the laws of the State of New Jersey and was the owner of the premises aforesaid located at and known as 32-02 Queens Boulevard, also known as 4501-4523 Van Dam Street, and also known as 4502-4524 32nd Place, in Long Island City, Borough of Queens, City of New York."

The aforesaid corporation named and described in the complaint had been dissolved pursuant to New Jersey law a short time before the occurrence complained of but was empowered by New Jersey statutes to appear and defend actions brought against it after dissolution.

Petitioner's (plaintiff's) attorney, Martin Rosen, in an affidavit verified December 22, 1959, described the commencement of this action as follows:

> "The above entitled matter was submitted to me by the subrogating insurance carrier of the various plaintiffs herein. The information contained in the documents submitted to me and the investigation conducted by my own office indicated that Beland Realty Corp., a New Jersey corporation having its offices at 54 Clark Street, Newark, N. J., with a telephone number of Humboldt 2-0772, were in fact the Landlords operators and owners of the property."

It was conceded below that not one of the respondents (who are now defendants herein) was ever served with process in this case.

As the New York State Supreme Court at Special Term found:

> (a) The defendant corporation appeared in the action and filed a petition removing the action to the federal court. Simultaneously therewith it answered the complaint and denied that it owned, operated or controlled the premises at which the incident set forth in the complaint allegedly occurred.
>
> (b) After the case had been removed to the federal court it was permitted to languish there and once was dismissed for lack of prosecution on December 10, 1956. After the dismissal for lack of prosecution, it was not restored to the calendar until 1959.
>
> (c) The record clearly establishes that more than five years after the action had begun, the plaintiffs, at a pre-trial conference in 1959, urged that the corporate defendant was liable for the damages alleged in the complaint by virtue of that corporation's *de facto* control of the premises even if it did not own the building and as a result of the pretrial conference a preliminary trial without a jury was directed on the question of whether or not the corporate defendant could be held legally responsible if indeed the allegations of the complaint were sustained. However, this preliminary trial was never held.

It was after the aforesaid restoration of the case to the calendar in 1959 that the preliminary trial on the issue of the corporate defendant's liability was to be held. At that point in the pertinent procedural chronology, after

the case had been dormant for five years, the record shows that—

(a) The action had been commenced in New York against a New Jersey corporation—even though the plaintiffs' leases and the appropriate land records in the Register's office showed that a partnership owned the property.

(b) In spite of the foregoing and the fact that the corporation's answer denied ownership and control of the premises, the plaintiffs had done nothing for more than five years.

The petitioners were doomed to defeat in the federal court in the context of the preliminary trial that had been directed by District Judge Savage. Apparently, in the belief that they could not proceed on such a preliminary trial, to stave off the inevitable, the final procedural step taken by the petitioners (plaintiffs) in the district court against the defendant New Jersey corporation, was the gambit of moving, pursuant to the federal rules, to amend the caption of the action. That motion, in June of 1960, was deceptively simple; on its face all it sought to achieve, and indeed all that was ruled upon by the district court, was an amendment of the caption replacing the defendant New Jersey corporation with the respondents (see the order of District Judge Bruchhausen dated October 10, 1960, and his opinion, reprinted at page 35 of the petition herein, all of which confirms that the district court considered plaintiffs' motion as nothing more than an application made solely under federal rules 15 and 4(h). *Adgms v. Beland Realty Corp.*; 187 F. Supp. 680 (E. D. N. Y. 1960).

The district court, in permitting such an amendment, did not resolve any other question. It is clear from the District Judge's opinion that the court did not presume

to suggest, much less dictate, to the New York State Supreme Court—to which action was perforce remanded because the amendment of the caption destroyed diversity jurisdiction—how the New York State Court would thereafter proceed with the action. Nor did the district court presume to deprive the New York State Supreme Court of its power to resolve questions of State Court jurisdiction over the respondents who, six years after the commencement of the action, had for the first time been injected into the litigation as defendants and thereby exposed to personal liability, in place of the New Jersey corporation against whom plaintiffs had fitfully prosecuted their action up to that time.

To emphasize the limited nature of the question passed upon by the district court on the motion to amend the caption, it is pertinent to note what transpired in the Court of Appeals following District Judge Bruchhausen's order amending the caption and remanding the action. The respondents sought a writ of mandamus from the Court of Appeals for the Second Circuit. Their petition for mandamus was denied by a divided court (284 Fed. 2d 783). Judge Clark, speaking for the majority of the Circuit Court, wrote:

> "* * * Our intention has been merely to pass on the procedural aspects of the proceedings as brought before us * * *." (284 Fed. 2d 783)

Immediately following remand of the case, the question of jurisdiction was presented to the New York Supreme Court by the defendants-respondents' special appearance pursuant to Section 237-a of the New York Civil Practice Act. It was particularly appropriate for the New York Court to decide the jurisdictional question thus raised, since the action had originally been commenced in that Court and indeed, even under the federal rules, the amendment of the caption related back to the commencement of the action. (On this latter point both District Judge

Bruchhausen and Circuit Judge Friendly agreed; see p. 49 of the petition.) The defendants-respondents were before the New York Court for the first time. Concededly, they had never been served with process in the manner prescribed by the New York Civil Practice Act. The action was henceforth to proceed in the New York courts to a final disposition.

It is respectfully submitted that the New York Civil Practice Act unquestionably controlled the issue as to whether the New York Supreme Court had jurisdiction to entertain the action against these respondents. In a detailed opinion, Justice Rabin of the State Supreme Court determined that jurisdiction was not present (*Adams* v. *Hirsch*, 29 Misc. 2d 648, 214 N. Y. S. 2d 796). The Appellate Division of the Supreme Court unanimously affirmed that finding, without opinion (petition, p. 53).

Petitioners emphasize the weakness of their position on the instant petition when they once again—as they did in the state court—seek to create an aura of knowledge or participation about the respondents, during the six years when the case was languishing in the federal district court against the New Jersey Corporation. Thus, for example, the petitioners disingenuously state that in 1954 it was the respondents who sent the summons and complaint to the insurer. As was emphasized to the New York Court both at Special Term and in the Appellate Division, the record—and particularly certain documentary exhibits—established the inescapable conclusion that a Joseph Levin (not one of the respondents) had received the summons and complaint from the building superintendent and had forwarded those papers to the insurance broker. Mr. Levin was an officer of the corporate defendant—that corporation being the only defendant named in and served with process—and that corporation was the very defendant upon whom plaintiffs intended to serve their process and against whom they prosecuted the action for almost six years.

Petitioners' rehearsal of the facts not only pinpoints the absense of any federal question but refers this honorable Court directly to the opinion of the learned Justice at the New York Supreme Court, Special Term. That opinion contained precise findings of fact refuting petitioners' contentions. The entire record was before the state court both at Special Term, as well as in the Appellate Division. The opinion rendered at Special Term, which was unanimously affirmed by the Appellate Division, shows that the true facts were viewed in the perspective of their actual occurrence.

After reciting all the facts before it (as they have been set forth above), Justice Rabin at Special Term, framed the issue as follows:

> "Never having been served with process in this action in the manner provided by section 222-a of the Civil Practice Act, they urge that this court never acquired jurisdiction over their persons and consequently the personal judgment sought against them herein is beyond its power to grant."

The opinion of Justice Rabin then emphasizes that while plaintiffs conceded that they had not served any of the individual respondents hereto—indeed never intended to—plaintiffs took the position that the order of the federal court District Judge which amended the caption of the action was *res judicata* "on the question of jurisdiction over the persons of the present defendants". (Petitioners have now abandoned the inapplicable principle of *res judicata* and seek refuge solely beneath the loosely defined concepts of "comity" and "law of the case". Both of these policy doctrines were urged in the state court and they were rejected.)

Special Term's review of the record was followed by a discussion of the principles urged by petitioners (appellants below) in their attempt to preclude the state court from passing upon the question of its jurisdiction that had

been raised by respondents' special appearance. The state court rejected all of petitioners' attempts to bind that court by what had previously transpired.

After confirming the principle that the State Supreme Court had the right to determine its own jurisdiction "over persons upon whom no service of process in accordance with New York's standards was ever made", Justice Rabin cited the clear precedents applicable to the situation at bar which called for the granting of the motion before him. In particular, he rebuffed the tendered applicability of "law of the case" and "comity" as doctrines of convenience and discretion not applicable on the present record. Of course, the learned State Court Justice recognized that a state court could not presume to review a decision of the federal district court. However, in accordance with the settled precedents as hereinafter noted, the Court found itself free to determine questions of its own jurisdiction, when properly raised by the parties before it, in the posture of the case as it then stood before the state court at what was merely one further stage of the pending litigation.

Inherent in the opinion of Justice Rabin is the basic distinction between the nature of the motion to amend which was brought by appellants in the federal court and the motion to dismiss brought after remand by the respondents. (It is also appropriate to note that under the federal rules a partnership can be served by leaving process with a "managing or general agent" [Rule 4(d)(3) Federal Rules of Civil Procedure], while under the New York Civil Practice Act [Sec. 222-a] jurisdiction over the partnership can be obtained only by serving one of the partners.)

The issue then being presented by the respondents—who had been newly injected into the case—was thus properly raised for the first, at the earliest possible moment and in accordance with New York practice and procedure. After reviewing all the applicable precedents and examining the facts at bar in the light shed by the precedents applying

the pertinent New York Civil Practice Act provisions, the state court found that it was without power to proceed against the respondents.

In so deciding the issue before him, Justice Rubin was merely following the path unquestionably left open to him by District Judge Bruchhausen and the majority opinion of the Circuit Court. Indeed, the justice at the New York Supreme Court's Special Term was merely following the blueprint laid down by Circuit Judge Friendly (in his dissent on the petition for mandamus):

> "In my view the correct path here is the one Judge Clark has so clearly discerned but has then declined to follow. That is to grant the petition for mandamus to the limited extent of directing modification of the order of the District Judge to permit the service of an amended complaint upon the partnership and to leave all questions of the effect of this action to the state court. Far from that being a profit-loss venture, it seems to me essential not merely to protect these petitioners, whose conduct may not have been overly appealing, but to prevent unwarranted intrusion into the domain of the New York courts where the action began and where it will end."

Corrected Statement of the Question Presented

In the light of the actual record, the true question is whether a substantial federal question is presented by the decision rendered at Special Term, Part I, New York Supreme Court (Queens County), which determined that under the procedures and practices established by the New York Civil Practice Act—and, in particular, under Sections 222-a and 237-a thereof—that the state court had not acquired jurisdiction "over the persons of the individual defendants to grant the *in personam* judgment here sought." *Adams v. Hirsch*, 29 Misc. 2d 641, 214, N. Y. S. 2d 796, 803 (April 17, 1961).

Argument

It is settled beyond cavil that to invoke the certiorari jurisdiction of this Supreme Court under 28 U. S. C. 1257, to review the decision of a state court, the petitioners must establish that a substantial federal question has been properly raised in the state court proceedings. Petitioners concede, as indeed they must that only subsection (3) of Section 1257 is pertinent hereto and the provisions of that subsection require that the petitioners have drawn into question (a) the validity of a federal treaty or statute; (b) the constitutionality of a state statute; or (c) that the petitioners have set up a title, right, privilege, or immunity which they claim "under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." It is respectfully submitted that the petitioners do not fall into any of the foregoing categories and that the record below does not disclose the existence of a substantial federal question herein. Therefore, the instant petition should be denied.

The petitioners' claim flies in the teeth of Justice Rabin's clear opinion applying the New York State Civil Practice Act to the facts as he found them upon the record. An objective reading of the record reenforces his opinion and confirms the absence of the requisite substantial federal question in the record before the state court.

The weight of the documentary evidence submitted to Justice Rabin at New York Supreme Court, Special Term, established that these respondents had not been brought before the state court in the manner provided by the New York State Civil Practice Act for the acquisition of jurisdiction over a partnership. Similarly, the overwhelming weight of the documentary evidence submitted established that under New York law, the respondents had neither waived such jurisdictional requirements nor had they participated in any of the prior proceedings against the New Jersey corporation so as to render themselves subject to

the jurisdiction of the New York courts. Thus, the learned state court justice, interpreting and applying the provisions of the New York State Civil Practice Act to the litigation as it was then before him, determined that the state court did not have jurisdiction to proceed against the respondents. It is uncontradicted in the record that none of the respondents were officers, stockholders or directors of the corporate defendant named in and served with the summons and complaint.

The applicable New York precedents were clear—and they are set forth in Justice Rabin's opinion—in requiring that the respondents' motion be granted.

To pinpoint the spurious nature of the federal question tendered by petitioners we emphasize the total absence from the pettion of any federal constitutional or statutory basis for the far-fetched argument that principles of comity and law of the case bind a state court to follow a district court's decision under the circumstances at bar.

I

The decision of the state court as enunciated by Mr. Justice Rabin at Special Term and unanimously confirmed by the New York Appellate Division, rested solely upon the ground of state procedure and practice and correctly applied the New York law. It is axiomatic that such a decision does not present a federal question.

The petition significantly does not raise any question as to the correctness of Justice Rabin's opinion interpreting and applying the New York procedural law to the facts at bar, which decision was unanimously affirmed, without opinion, by the Appellate Division of the New York Supreme Court. The opinion rendered by the Court at Special Term clearly establishes that this case does not truly involve any federal question whatever.

The petition herein fails to identify with particularity, the federal right which petitioners seek to assert in directing itself to the affirmance by the New York Appellate Court.

To the extent that petitioners are unhappy with the factual determinations reached by the state court, it is clear that these findings of fact by themselves do not give rise to any federal question. It is too well established to require citation of authority to support the proposition that this Court will not assert its jurisdiction to review state court decisions based solely on questions of fact.

It is also well established that state court decisions based solely upon state procedure and practice will not provide the basis for review by certiorari where that state procedure and practice does not itself draw into question federal constitutional issues.

Petitioners no doubt recognize this for what they urge is that the state court judge was precluded from considering the facts presented by the respondents' special appearance, even though the facts were presented within the proper procedural framework as permitted by state law, to test the jurisdiction of the state court.

The issue for consideration before the state court at Special Term was raised under New York Civil Practice Act, Section 237 a, pursuant to which the respondents had appeared specially (petition, pp. 6-7). Admittedly, none of the respondents had ever been served with process as required by New York law.

Since, under the federal rules, the decision of the district court is said to relate back to the commencement of the action, it returned the case to the state court in that very posture; therefore, even those rules cannot be held to have barred respondents from challenging the state court's jurisdiction *ab initio*.

The New York Civil Practice Act is clear in its single provision governing the service of process on a partnership. Section 222-a provides:

> "§ *222-a. Action or proceeding in partnership name.*
>
> "Two or more persons carrying on business as partners may sue, or be sued in their partnership name whether or not such name comprises the names of the persons. If the persons be defendants in an action or proceeding, the summons or other process may be served upon any one or more of them with like effect as though all of the persons had been named as defendants by their own respective names."

Why then, after six years of plaintiffs' (petitioners') failure to diligently prosecute the action, should respondents be barred from asserting a defense or objection which they would have been entitled to raise had petitioners proceeded properly and diligently at the outset?

The applicable New York precedent were uniform and completely dispositive of the procedural issues raised by respondents. The leading principle set forth in the New York case of *Erickson* v. *Macy*, 231 N. Y. 86, 90, as applied in situations parallel to the one presented by the instant record was found to lead inexorably to one result, to wit, the upholding of respondents' special appearance. Under New York law this decision was unquestionably correct. (See cases cited in the opinion below at 214 N. Y. S. 2d 796, 802-803; petition, pp. 32-34.)

II

The complaint in this action is not founded upon any claimed federal right; petitioners are incorrect in urging as a substantial federal question the refusal of the state court to be bound either by the doctrine of "comity" or "law of the case" to the district court's decision on the motion to amend.

When the record is read objectively and viewed in the light of all the proceedings which took place prior to remand, it is clear that the New York State Court was completely free to determine its own jurisdiction under the governing New York procedure, following remand. Neither the policy doctrine of "comity" nor of "law of the case" can be used to impart to the district court's opinion a significance which it did not purport to have, and which federal constitutional and statutory principles would not impose. Neither the district court nor the court of appeals sought to dictate to the New York State Court the course it should follow during the future conduct of the litigation after it was returned to the state court.

At the outset, for logical presentation, it is essential to note the well established rule that the jurisdiction of a district court on removal of a case from a state court is a derivative jurisdiction only, the federal court acquiring no greater jurisdiction over the person or the subject matter of the defendants than was originally obtained in the state forum where the action initially was launched. *Lambert Run Coal Co. v. Baltimore & Ohio Rg. Co.*, 258 U. S. 377, 42 S. Ct. 349, 66 L. Ed. 671; *Bonze v. Mardis Sportswear, Inc.* (2nd Cir. 1948), 165 Fed. 2d 33; *Ultra Sucro Co. v. Illinois Water Treatment Co.* (D. C. S. D. N. Y. 1956), 146 Fed. Supp. 393; *Shaye v. Wendy Wilson, Inc.* (D. C. S. D. N. Y. 1959), 171 Fed. Supp. 117. The import of the above decisions is that even removal by the very defendant served does not constitute a waiver of questions of service in the state court; as Judge Learned Hand held in *Bonze v. Mar-*

dis Sportswear, Inc., supra, at page 35, "* * * the first question (for the Federal Court) is whether the service was valid under the New York decisions."

We come next to the consideration of the posture of the instant litigation upon remand to the state court. The respondents had been propelled into the action more than five years after it had been commenced. The motion which thrust them into the litgation was one to amend the caption and was made solely under the federal rules. No consideration was given by the federal district judge to state law provisions governing amendment of caption, substitution of parties or service of process. Had he done so, he could not have granted the relief requested; the law of New York is unquestionably clear in its application to the vital interlocking questions of substitution of parties, amendments of caption and service of process as they appear on this record—and as established by Mr. Justice Rabin in his opinion, New York law does not permit the continuation of this action against these individual respondents. The significance of the foregoing in reference to the instant petition is to establish that the question before the state court was not the same question as ruled on by the district court. Therefore, even if considerations of comity or law of the case were properly raised they would not require a result contrary to the one reached.

It is obvious that with the state law so clearly opposed to petitioners' contentions, they have been unable to muster a head-on attack against the decision below—but, have set out to engulf this Court with a plethora of inapplicable decisions upon the broad policy concepts of "comity" and "law of the case", concepts which were considered below and found inapplicable to the situation at bar.

Certainly, where a case is remanded, *ab initio*, to the state court, the basic questions of jurisdiction, service and capacity must be left to the state court for its determination. Let us pause to consider how inequitable a contrary

situation would be; if the plaintiffs had initially named and designated these respondents as defendants, and had attempted to serve them, they unquestionably would have had the right to appear specially and contest the jurisdiction over them. Are they now to be denied that opportunity because the petitioners had sputtered and blundered for almost eight full years from the commencement of this action? We respectfully submit that the answer to the foregoing question is self-evident upon this record.

We respectfully submit that it is clear beyond question that after remand the case continues in the state court to be governed by all the procedures available to the parties under state law.

In *Ayres v. Wiswall*, 112 U. S. 187, 190, 38 L. Ed. at 695, in a case where remand to the state court was directed after one of the defendants had interposed his answer while the case was in the federal court, Mr. Chief Justice Waite writing for the Supreme Court used the following significant language in his opinion:

> "The fact that Ebenezer R. Ayres had filed his answer in the United States Court is a matter of no importance. That fact did not of itself confer jurisdiction if there had been none before. It will be for the State Court, when the case gets back there, to determine what shall be done with pleadings filed and testimony taken during the pendency of the suit in the other jurisdiction."

Remand of a case leaves the respective litigants free to continue their dispute in the state courts and they "retain such rights as they may have to continue the litigation in the state court. * * *" *U. S. v. Rice*, 327 U. S. at 749, 66 S. Ct. at 838. See also *In re Bear River Drainage District*, 267 F. 2d 849 (10th Cir. 1959).

In his decision below the justice presiding at Special Term rejected the applicability to the circumstances at bar of those nebulous concepts known as "comity" and "law of the case".

In urging that the principal of comity "requires" that the district court's order amending the caption of the action be accorded absolute recognition, binding upon the state court, petitioners ignore the very definition of comity. Comity implies the grant of a privilege "not as a matter of right but out of deference and good-will." (Black's Law Dictionary 4th ed.). Thus, the principle is most frequently encountered in proceedings involving disputes, which have contacts with courts of different nations. By definition comity is voluntary assent which is not applied when the decision urged is contrary to the known policy or rules of the forum in which its application is sought (Black's Law Dictionary, *supra*). Also, the question upon which comity is urged must be the "like" question which was previously decided.

By definition, this concept merely gives a court the opportunity to refuse to reopen a matter which has previously been determined or passed upon by a court at a prior stage in the "same" case. Most frequently its application is limited to decisions, judgment, opinion or ruling on a former appeal in the case (see Black's Law Dictionary, 4th ed., p. 1030, wherein it is said: "The doctrine expresses practice of courts generally to refuse to reopen what has been decided"). By this time we believe it virtually *prima facie* that the doctrine cannot be applied to bar the decision rendered at Special Term upon an issue and question never before the District Court. In any event, as Mr. Justice Rabin emphasized below, in *Ragen v. McCloskey* (305 N. Y. 75, 78)—"the Court of Appeals stated that the doctrine of law of the case, as distinguished from *res judicata* is, therefore, not binding upon this court" (508).

The appellant's contention as to the applicability of the doctrine of the "law of the case" was fully considered below. It was rejected because the case before the state court, after remand, did not present the same issue that had been decided by the district court and indeed, as confirmed by the Second Circuit in both the majority and dissenting opinions on petition for mandamus. Justice Rabin's finding that nothing in the prior proceedings could bar his

determining whether or not New York courts had jurisdiction to proceed with the case is a finding which has the overwhelming support of applicable legal precedents and the principles governing the relationship between federal and state judicial systems.

The authority offered by petitioners is indeed remote, and oft times self-defeating. For example, the *Paramount* case cited at page 16 of the petition defeats rather than supports petitioners, for in that case the New York court refused to prejudge the jurisdiction of the English court, leaving it to the court of the forum (England) to determine the effect of its own process (236 App. Div. 756; 11 N. Y. S. 2d at 772).

Equally self-defeating is the citation from the *Benham* case (p. 16 of the petition).

Petitioners' present numerous cases supposedly typifying the applications of "comity" or "law of the case"; but, not one of these cases supports the contention that a federal question arises when after remand, upon the record at bar, the state court proceeded to determine that it did not have jurisdiction and could not proceed under state law.

Whether or not the New York courts were bound by principles of comity or law of the case to foreclose the respondents, after remand, from attacking the *in personam* jurisdiction of the New York courts over them, is not a federal question which serves as the prerequisite for granting a petition for certiorari.

In concluding their argument petitioners summarize their position as urging this Court "to hold as a matter of law that the doctrines of comity and the law of the case supplemented by *stare decisis* prevented the state court from ruling upon its own jurisdiction. It is respectfully submitted that this summary, in petitioners' own words, is a concession that the record does not present the requisite federal question to warrant granting the writ sought.

The issue before the state court following remand was clearly a different issue than the one which had been presented to the district court. The state court was fully aware of this distinction. Upon the arguments of "comity" or "law of the case", the state court was free to determine that there did not exist sufficient identity between the issues and the parties so as to require blind adherence to the determination of the district court. Indeed, a mere comparison of the district court's opinion with the opinion of Special Term makes it self-evident that entirely different issues were being litigated before the state court. Having failed to establish any supervening federal question, the petition must fall under the long-established principle that such questions as comity and law of the case are for the exclusive determination of the state court and will not be reviewed by this Supreme Court (see: *Allen* v. *Alleghany Co.*, 196 U. S. 458, 465, 49 L. Ed. 551, 556, citing *Finney* v. *Guy*, 189 U. S. 335, 47 L. Ed. 839, 23 Sup. Ct. 558).

CONCLUSION

The petition is completely without merit. Petitioners have completely failed to establish any federal question whatever on this record to support their argument that "comity" and "law of the case" precluded the state court from passing upon its jurisdiction. The petition should be denied.

Dated: March 9, 1963.

Respectfully submitted,

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